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5658

1603 No. ~~5644~~.

IN THE

1597

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Pacific Coin Lock Company, a corporation of California,
Appellant,

vs.

Coin Controlling Lock Company, a corporation of Arizona,
Appellee.

APPELLANT'S BRIEF.

NEWBY & NEWBY,
By NATHAN NEWBY,
Attorneys for Appellant.

NATHAN NEWBY, JR.,
Of Counsel.

FILED
JAN 21 1929
PAUL P. O'BRIEN,
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TOPICAL INDEX.

TABLE OF CASES AND AUTHORITIES CITED.

No. 5644.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Pacific Coin Lock Company, a corporation of California,
Appellant,

vs.

Coin Controlling Lock Company, a corporation of Arizona,
Appellee.

APPELLANT'S BRIEF.

I.

STATEMENT OF THE CASE.

The Coin Controlling Lock Company, an Arizona corporation, appellee, was engaged in the business of manufacturing coin controlled locks for use in comfort stations, rest rooms and toilets, the coin controlled lock being affixed to the door of the toilet and opened by depositing a coin in the lock.

The appellee rented its locks to independent parties to use in certain territories, retaining title to the locks, but permitting their use by others upon payment of a fixed yearly rental.

The appellant, Pacific Coin Lock Company, a California corporation, entered into an agreement with the appellee, under the terms of which it rented from the latter a quantity of locks to be used in toilet locations secured by the appellant within the district in which it had been granted the exclusive right to use appellee's locks. This territory embraced Texas, California, Washington and Oregon.

The appellant secured locations in its territory and entered into numerous contracts between itself and the owners of the toilets, whereby the owners obligated themselves to permit the appellant to install locks on the toilet doors in return for a certain percentage of the receipts from the locks. The contracts did not stipulate what locks were to be used. There was no privity of contract between the toilet owners and the appellee.

Relying upon the clauses in its contract with the Coin Controlling Lock Company which provided that the appellee would furnish all the locks needed by the appellant, said locks to be of good workmanship and material, the appellant entered into a great many contracts with toilet owners for the placing of locks in their establishments.

The appellee, however, failed and neglected to furnish the appellant locks as needed or locks of good workmanship and material, thereby seriously hampering appellant in the conduct of its business and causing it the loss of some very valuable and choice locations.

With this state of affairs exisiting the appellant, on April 23, 1923, gave appellant notice of termination of the contract because of the failure of the appellee to

perform its covenants and refused to accept more of the appellee's locks. The appellant also returned all of the locks in its possession and paid the rentals due on said locks up to and including the 1st day of July, 1923.

The appellee then filed an action against the appellant commencing its suit by a bill in equity, No. G-101, wherein it sought to do three things:

First: To enjoin the appellant from detaching any locks from any location upon which they had been installed.

Second: To require the appellant to account to the plaintiff for all of the rentals due and all of the sums due the defendant under lease contracts then in existence.

Third: To have an interlocutory receiver appointed to take over the business of the appellant until the matters in dispute should have been adjudicated.

The appellant filed a motion to dismiss this bill No. G-101, which was granted and the case was then transferred on stipulation of the parties to the law side of the court.

On the hearing of the motion counsel for the appellant argued that the appellee was seeking to construe the contract in such a manner as to give it an interest in the business. Judge Benjamin F. Bledsoe heard the motion and granted the motion of appellant to dismiss on the theory that the appellee did not have an interest in the business and that it was not entitled to an accounting and receivership, or the locations, or injunctive relief, but that its only remedy, if any, was damages for breach of the contract, which under his ruling would be the rental

value of the locks, and the value of any locks not returned.

The only questions properly before the District Court were whether or not the Pacific Coin Lock Company breached its contract with the Coin Controlling Lock Company. The amount of damages due the Coin Lock Company, if any; and whether or not the Pacific Coin Lock Company was entitled to recover on its counterclaim for the breaches of the Coin Lock Company alleged therein.

The cause was tried on the law side of the court before the Honorable Edward J. Henning, who rendered judgment for the plaintiff and made the following findings of fact and conclusions of law:

(Title of Court and Cause.)

"FINDINGS OF FACT AND CONCLUSIONS OF LAW.

"The above entitled matter came on regularly to be heard in the United States District Court for the Southern District of California, Southern Division, before the Honorable Edward J. Henning on October 19th, 1927; Clyde H. Jones, Albert Schoonover, J. Robert O'Connor and E. D. Martindale appeared as counsel for the plaintiff, and Mr. Nathan Newby of the firm of Newby & Newby appeared as counsel for the defendant. A jury was waived by written stipulation, and evidence both oral and documentary was received by the court, and the evidence having been closed and the case argued by counsel the court thereupon ordered the case submitted and thereafter, upon the 3rd day of March, 1928, rendered a written memorandum decision and now makes the following findings of fact and conclusions of law.

"The court finds:

I.

"That plaintiff, Coin Controlling Lock Company, is a corporation duly organized and existing under the laws of the state of Arizona and a citizen and resident of said state, and the defendant, Pacific Coin Lock Company, is a corporation duly organized and existing under the laws of the state of California, and a citizen of and resident of said state.

II.

"That on February 23, 1915, and long prior thereto plaintiff was the owner of sundry United tSates and foreign letters patent on coin controlled locks, which said coin controlled locks are a mechanism to be placed on doors so that said doors cannot be opened without dropping a coin in said coin controlled lock.

III.

"That on February 23, 1915, plaintiff entered into a certain contract at Indianapolis, Indiana, whereby plaintiff leased to one Charles C. Garrison of Los Angeles, California, for a period as long as rentals were paid as in said contract specified. One hundred (100) coin controlled locks for the exclusive use of the said Charles C. Garrison in the state of California, which said coin controlled locks were owned by plaintiff and covered by sundry United States and foreign patents belonging to plaintiffs, as aforesaid, and the said contract further provided that plaintiff would lease additional locks belonging to plaintiff for the exclusive use of said Charles C. Garrison in the state of California.

IV.

"That thereafter and on February 23rd, 1915, the said Charles C. Garrison for a valuable consid-

eration, assigned, sold and transferred all of his right, title and interest in the said contract to the defendant, Pacific Coin Lock Company, a corporation of California, and plaintiff for a valuable consideration gave its consent to the assignment from the said Charles C. Garrison to the defendant, Pacific Coin Lock Company. That thereafter said contract was extended to include the states of Washington, Oregon and Texas.

V.

"That at various and sundry times from and after the said February 23rd, 1915, plaintiff delivered to the defendant, Pacific Coin Lock Company, large numbers of coin controlled locks covered by the said letters patent belonging to plaintiff, to be used by the said defendant, Pacific Coin Lock Company, in accordance with the terms and conditions of the aforesaid contract.

VI.

"That under the terms and conditions of said contract, the plaintiff guaranteed its lock as to material, workmanship and repair and agreed specifically to lease defendant additional locks as needed. Plaintiff failed from time to time in living up to its agreement. The defendant, however, did not take advantage of these situations as they arose from time to time.

VII.

"That under the terms and conditions of said contract the defendant had the right to terminate said contract on December 31st of any given year.

VIII.

"That on January 1st, 1923, defendant paid to the plaintiff lock rental for the next six months.

IX.

"That on April 23rd, 1923, defendant notified the plaintiff that it had terminated the contract and returned the plaintiff all of plaintiff's locks.

X.

"That plaintiff acted promptly and immediately brought suit against the plaintiff for damages for breach of contract.

"As Conclusions of Law From the Foregoing Findings of Fact, the Court Finds:

I.

"That as the defendant did not take advantage of the favor of the plaintiff to furnish to it locks as needed as the situations arose, defendant by its conduct condoned them and the plaintiff acted promptly when the defendant terminated the contract which in its judgment gave it cause for complaint, while on the other hand the defendant by its course of conduct in the face of complaints, substantially condoned the faults of plaintiff.

II.

"That the payment of the lock rental on January 1st, 1923, worked an automatic renewal of the contract for one year and while the defendant could terminate the contract as of December 31st of any year without a violation by it of the contract, defendant did, when it gave notice of termination on April 23rd, 1923, terminate the contract as of December 31st, 1923, instead of June 30th, 1923, as it sought to do.

III.

"Having given notice of termination the defendant should have paid the plaintiff on July 1st, 1923, rent-

als for the second half of the year on the basis of the locks chargeable to it on April 23, 1923.

IV.

"That plaintiff was entitled to recover rental on the locks for the second half of the year, 1923, for the number of locks chargeable to the defendant on April 23rd, 1923, but without costs.

V.

"That the defendant may not recover on its counterclaim.

"Let judgment be entered accordingly.

EDWARD J. HENNING,
Judge.

"Dated April 6th, 1928.

(Endorsed): "Received copy of the within findings this 5th day of April, 1928. Newby & Newby, by Nathan Newby, attorneys for the plaintiff. Filed April 6th, 1928. R. S. Zimmerman, clerk, by Francis E. Cross, deputy."

After these findings of fact and conclusions of law had been served on the defendant and appellant and had been signed and duly filed on April 6th, 1928, the court made amended findings of fact and conclusions of law as follows:

(Title of Court and Cause.)

"AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

"The above entitled matter came on regularly to be heard in the United States District Court for the Southern District of California, Southern Division, before the Honorable Edward J. Henning on October 19th, 1927; Clyde H. Jones, Albert Schoonover, J. Robert O'Connor and E. D. Martindale

appeared as counsel for the plaintiff, and Mr. Nathan Newby of the firm of Newby & Newby appeared as counsel for the defendant. A jury was waived by written stipulation, and evidence both oral and documentary was received by the court, and the evidence having been closed and the case argued by counsel the court thereupon ordered the case submitted and thereafter, upon the 3rd day of March, 1928, rendered a written memorandum decision and now makes the following findings of fact and conclusions of law.

"The court finds:

I.

"That plaintiff, Coin Controlling Lock Company, is a corporation duly organized and existing under the laws of the state of Arizona and a citizen and resident of said state, and the defendant, Pacific Coin Lock Company, is a corporation duly organized and exisiting under the laws of the state of California, and a citizen of and resident of said state.

II.

"That on February 23, 1915, and long prior thereto plaintiff was the owner of sundry United States and foreign letters patent on coin controlled locks, which said coin controlled locks are a mechanism to be placed on doors so that said doors cannot be opened without dropping a coin in said coin controlled lock.

III.

"That on February 23, 1915, plaintiff entered into a certain contract at Indianapolis, Indiana, whereby plaintiff leased to one Charles C. Garrison of Los Angeles, California, for a period as long as rentals were paid as in said contract specified, one hundred (100) coin controlled locks for the exclusive

use of the said Charles C. Garrison in the state of California, which said coin controlled locks were owned by plaintiff and covered by sundry United States and foreign patents belonging to plaintiff, as aforesaid, and the said contract further provided that plaintiff would lease additional locks belonging to plaintiff for the exclusive use of said Charles C. Garrison in the state of California.

IV.

"That thereafter and on February 23, 1915, the said Charles C. Garrison for a valuable consideration, assigned, sold and transferred all of his right, title and interest in the said contract to the defendant, Pacific Coin Lock Company, a corporation of California, and plaintiff for a valuable consideration, gave its consent to the assignment from the said Charles C. Garrison to the defendant, Pacific Coin Lock Company. That thereafter said contract was extended to include the states of Washington, Oregon and Texas.

V.

"That at various and sundry times from and after the said February 23, 1915, plaintiff delivered to the defendant, Pacific Coin Lock Company, large numbers of coin controlled locks covered by the said letters patent belonging to plaintiff, to be used by the said defendant, Pacific Coin Lock Company, in accordance with the terms and conditions of the aforesaid contract.

VI.

"That under the terms and conditions of said contract the plaintiff guaranteed its lock as to material, workmanship and repair and agreed specifically to lease defendant additional locks as needed. Plaintiff failed from time to time in living up to its agree-

ment. The defendant, however, did not take advantage of these situations as they arise from time to time.

VII.

"That under the terms and conditions of said contract the defendant had the right to terminate said contract on December 31st of any given year.

VIII.

"That on January 1st, 1923. defendant paid to the plaintiff lock rental for the next six months.

IX.

"That on April 23rd, 1923, defendant notified the plaintiff that it had terminated the contract and returned to the plaintiff all of plaintiff's locks; that on said April 23rd, 1923, the defendant had in its possession six hundred and four (604) locks chargeable to it at five ($5.00) dollars each for the last six (6) months of 1923.

X.

"That plaintiff acted promptly and immediately brought suit against defendant for damages for breach of contract.

"As conclusions of law from the foregoing findings of fact the court finds:

I.

"That as the defendant did not take advantage of the failure of the plaintiff to furnish to it locks as needed as these situations arose, defendant by its conduct condoned them and the plaintiff acted promptly when the defendant terminated the contract which in its judgment gave it cause to complain, while on the other hand the defendant by its course of conduct in the face of complaints substantially condoned the faults of plaintiff.

II.

"That the payment of the lock rental on January 1st, 1923, worked an automatic renewal of the contract for one year and while the defendant could terminate the contract as of December 31st of any year without a violation by it of the contract, defendant did, when it gave notice of termination on April 23rd, 1923, terminate the contract as of December 31st, 1923, instead of June 30th, 1923, as it sought to do.

III.

"Having given notice of termination the defendant should have paid the plaintiff on July 1st, 1923, rentals for the second half of the year on the basis of the locks chargeable to it on April 23rd, 1923.

IV.

"That plaintiff is entitled to recover damages on the basis of rentals on the locks for the second half of the year 1923 for six hundred and four (604) locks chargeable to the defendant on April 23rd, 1923, at five ($5.00) dollars each, amounting to three thousand and twenty ($3020.00) dollars, but without costs.

V.

"That the defendant may not recover on its counterclaim.

"Let judgment be entered accordingly.

"Dated May 10th, 1928.

EDWARD J. HENNING,
Judge."

(Endorsed): "Filed Jun. 20, 1928. R. S. Zimmerman, clerk; by Francis E. Cross, deputy clerk."

The amended findings of fact and conclusions of law were not signed by the judge until May 10th, 1928, about a month late, and the judgment was filed June 20th, 1928.

The differences between the original findings and conclusions of law and amended findings and conclusions of laws are as follows:

1. Finding No. IX of the original findings of fact and conclusions of law is as follows:

> "That on April 23rd, 1923, defendant notified the plaintiff that it had terminated the contract and returned to the plaintiff all of plaintiff's locks."

2. Finding No. IX of the amended findings of fact and conclusions of law is as follows:

> "That on April 23rd, 1923, defendant notified the plaintiff that it had terminated the contract and returned to the plaintiff all of plaintiff's locks; that on said April 23rd, 1923, the defendant had in its possession six hundred and four (604) locks chargeable to it at five ($5.00) dollars each for the last six (6) months of 1923."

The differences between the conclusions of law are as follows:

1. Conclusion of Law No. IV of the original conclusions of law is as follows:

> "That plaintiff is entitled to recover rentals on the locks for the second half of the year 1923 for the number of locks chargeable to the defendant on April 23rd, 1923, but without costs."

2. Conclusion of Law No. IV of the amended conclusions of law is as follows:

> "That plaintiff is entitled to recover damages on the basis of rentals on the locks for the second half of the year 1923 for six hundred and four (604) locks chargeable to the defendant on April 23rd, 1923, at five ($5.00) dollars each, amounting to three thousand and twenty ($3020.00) dollars, but without costs."

Judgment was entered on the amended findings and conclusions of law on the 20th day of June, 1928, said judgment being as follows:

(Title of Court and Cause.)

"JUDGMENT.

"By reason of the law and findings on file herein.

"It is ordered, adjudged and decree:

"That plaintiff have judgment against the defendant Pacific Coin Lock Company, a corporation, for the sum of $3020.00; and

"It is further ordered, adjudged and decree:

"That the defendant, Pacific Coin Lock Company, a corporation, take nothing by reason of its cross-complaint on file herein.

"Let execution issue accordingly.

"Dated: June 20th, 1928.

EDWARD J. HENNING.

"Judgment entered June 20th, 1928."

It is from this judgment that the appellant appeals.

II.

SPECIFICATIONS OF ERRORS.

In perfecting its appeal the appellant assigned the following errors:

(Title of Court and Cause.)

"Assignment of Errors.

"Comes now the Pacific Coin Lock Company, a corporation, and in conjunction with and as a part of its appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment of the court entered on the 20th day of June, 1928, tenders and files this its assignment of errors, to-wit:

"1. That the District Court erred in determining that the evidence is sufficient to sustain or justify the finding 'that the plaintiff acted promptly and immediately brought suit against defendant for damages for breach of contract' when the evidence is insufficient to sustain or justify said decision.

"2. The District Court erred in determining that the evidence was sufficient to sustain or justify the finding or conclusion of law "that as the defendant did not take advantage of the favor of the plaintiff to furnish it locks as needed, as the situations arose, defendant, by its conduct, condoned them and the plaintiff acted promptly when the defendant terminated the contract, which in its judgment gave it cause for complaint, while on the other hand the defendant by its course of conduct in the face of complaint substantially condoned the faults of plaintiff,' when the evidence is insufficient to sustain or justify said finding.

"3. The District Court erred in determining that the complaint permitted or the evidence is insufficient to sustain or justify the finding 'that on April 3, 1923, the defendant had in its possession 604 locks chargeable to it at $5.00 each for the last six months of 1923,' when the complaint and the evidence is insufficient to sustain or justify the said finding.

"4. The District Court erred in determining that the evidence is sufficient to sustain or justify the finding or conclusion of law 'that the defendant did, when it gave notice of termination on April 23, 1923, terminate the contract as of December 31, 1923, instead of June 30, 1923, as it sought to do,' when the evidence is insufficient to sustain or justify the said finding.

"5. That the District Court erred in determining that the complaint and the evidence is sufficient to sustain or justify the finding or conclusion of law 'that plaintiff is entitled to recover damages on the basis of rentals on the locks for the second half of the year 1923 for 604 locks chargeable to the defendant on April 23, 1923, at $5.00 each, amounting to $3020.00,' when the complaint and the evidence is insufficient to sustain or justify the said finding.

"6. That the District Court erred in making the judgment entered herein on the 20th day of June, 1928, in that the said judgment is not supported by the evidence; nor by the complaint.

"7. That the District Court erred in entering the said judgment entered herein on the 20th day of June, 1928, in that the said judgment is not supported by the conclusions of law, nor authorized by the complaint.

"8. The District Court erred in denying the defendant's action upon its counterclaim.

"9. The District Court erred in denying the defendant's motion for a non-suit at the conclusion of the plaintiff's evidence.

"10. The District Court erred in signing and filing amended findings of fact and conclusions of law on the 10th day of May, 1928, when heretofore, to-wit: on the 6th day of April, 1928, it had already signed and filed findings of fact and conclusions of law herein.

"11. The District Court erred in making findings Nos. 9 and 10.

"12. The District Court erred in making conclusions of law Nos. 1, 3, 4 and 5.

"13. The District Court erred in admitting into evidence over the defendant's objection Plaintiff's Exhibit 21. Exhibit 21 purports to be a statement of locations under contract to Pacific Coin Lock Company for pay-toilet service as of April 23, 1923. It purports to show the date of contracts with various lock users, the expiration of these contracts, the number of locks used under each particular contract and the number of unexpired years under each particular contract.

"16. The District Court erred in overruling the defendant's objection to the following question propounded to the witness Van Cleave, 'You may state to the court what was stated between you and Mr. Miller upon that subject.' A. 'Mr. Miller asked me if I wouldn't modify the contract, wouldn't consent to a provision of the contract whereby they would not forfeit the business in the event they discontinued the use of our locks; I told him no.'"

III.

QUESTIONS.

There are three major propositions before this court for its decision.

1. Did the appellee properly allege and prove the damages awarded it by the lower court?

2. Did the court err in failing to grant the appellant damages on its counterclaim?

3. Are the findings of fact and conclusions of law drawn in proper form and do they support the judgment?

It is the contention of the appellant that the appellee not only failed to prove any damages but also failed to allege any facts upon which damages might be based.

The court erred in admitting the matters found in assignment of error Nos. 13 and 16 as they were irrelevant and not within the issues as framed by the pleadings.

It is also the contention of the appellant that it not only proved a breach on the part of the appellee of its covenants, but that appellant was damaged by virtue of the appellee's breaches and that it properly alleged and proved these damages.

The court tried the case on the theory of an equity suit and awarded special damages as if specially pleaded and proved. The court's judgment is based upon amended findings of fact which are inconsistent, not within the issues, contradictory and conflicting, as pointed out in the assignment of errors and as shown by a perusal of findings V and VI.

The matters mentioned above are the questions upon which this appellant appeals.

ARGUMENT.

I.

The Amended Complaint Fails to Properly Allege Any Facts or Damages Upon Which the Court Would Have Been Justified in Giving Its Judgment for the Rental Value of Locks Used by the Appellee.

In the first place it must be remembered that the appellee commenced its action by a bill in equity, No. G101, wherein it sought to do three things:

First: To enjoin the appellant from detaching any locks from any location upon which they been installed.

Second: To require the appellant to account to the plaintiff for all of the rentals due and all of the sums due the defendant under lease contracts then in existence.

Third: To have an interlocutory receiver appointed to take over the business of the appellant until the matters in dispute should have been adjudicated.

The lower court, Judge Bledsoe presiding, decided that the appellee had no interest in the business of the appellant. Therefore neither the value of the lock locations nor the rental values of the subleases could be the basis of the measure of damages. And the decision of Judge Bledsoe's court became binding upon the lower court which tried this law action. In other words it became the law of the case. This proposition is well supported by the authorities and the language of the court is most emphatic. In the case of Commercial Union of America v. Anglo-South American Bank, 10 Fed. (2nd) 937 at 939 the court says:

"In Wakelee v. Davis, 44 F. 532, Judge Coxe sitting in the Circuit Court for the Southern District of New York in 1891, in a case which had been twice before the court on demurrer, said:

'The propositions of law presented are the same now as on demurrer. Some testimony has been taken pro and con, but, upon all important questions, it is substantially conceded that the legal aspects of the case remain unchanged. It is true that in deciding the issues presented by the demurrer the court spoke through another judge, but the law there enunciated is not merely the individual opinion of the judge who presided; it is the law of this court, to be followed, upon similar facts, until a different rule is laid down by the Supreme Court. A re-examination and discussion of the question involved is, therefore, unnecessary, for the reason that the court is constrained to follow its former decision.'"

In Shreve v. Cheesman, 69 F. 785, 790, 16 C. C. A. 413, 418, Judge Sanborn, writing for the Circuit Court of Appeals in the Eighth Circuit, in 1895, said:

'It is a principle of general jurisprudence that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action. This principle is nowhere more firmly established or more implicitly followed than in the circuit courts of the United States. A deliberate decision of a question of law by one of these courts is generally treated as a controlling precedent in every Federal Circuit Court in the Union, until it is reversed or modified by an appellate court.' Striking illustrations of this principle will be found in Vulcanite Co. v. Willis,

1 Flip, 389, 393, Fed. Cas. No. 5, 603, in which Judge Emmons said in these courts: 'They constitute a single system; and when one court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demand it should be followed until modified by the appellate court. * * * So great, however, is the importance I attach to uniformity of decision by courts of coordinate jurisdiction, that I feel constrained to adopt the rule thus established in the several districts in which these cases arose. It seems more important that the rule should be uniform and certain than that it should be consistent with principle'; Welle v. Navigation Co."

To the same effect is Wakelee v. Davis, 44 Fed. 534, wherein it was held that (p. 532):

"A decision on demurrer is the law of the case until a different rule is laid down by the supreme court, although such decision was rendered by another judge than the one trying the case finally."

And the following cases support this rule:

Presidio Mining Co. v. Overton et al., 261 Fed. 933, 939;

Taylor v. Decatur Co., 112 Fed. 449;

Shreve v. Cheesman, 69 Fed. 785;

Reynolds et al v. Iron Silver Mining Co., 33 Fed. 354.

Judge Henning recognized this principle by refusing to give the appellee the value of the locations or the rental value of the subleases, but gave the appellee damages based on the rental value of the locks for the remaining term of the contract, i. e., for a six months' period, although the complaint was framed on the theory that

appellee was entitled to the value of the locations and the rental value of the subleases. In other words, it was a complaint framed on an equity theory attempting to recover equitable relief in a court of law. This is more apparent when paragraphs seven, eight and nine and the prayer of the complaint are examined. They are as follows:

> "Seventh: Plaintiff further alleges that by reason of defendant's said breaches of said contract hereto attached, and marked 'Exhibit A,' plaintiff is entitled to the value of all the lease contracts in existence on April 23, 1923, between the defendant and all other persons, firms or corporations covering coin locks installed by defendant in the states of California, Washington, Oregon and Texas, as plaintiff's stipulated damages fixed by paragraph 6 of said contract, 'Exhibit A,' which lease contracts plaintiff is informed and believes, and on said information and belief alleges the fact to be, are of the reasonable value of one hundred thousand dollars ($100,000). That it would be and was and is impracticable or extremely difficult to fix the actual damages so fixed in said paragraph 6 of said contract, 'Exhibit A.'
>
> "Eighth: *Plaintiff further alleges that the defendant has in its possession 183 locks* belonging to the plaintiff and although requested so to do by plaintiff, defendant has failed and refused, and continues to fail and refuse to deliver said locks to plaintiff. *That the reasonable value of said locks is twenty-five ($25.00) dollars each for the said 183 locks.*
>
> "Ninth: That by reason of the breaches of the said contract, 'Exhibit A' hereto attached, which said breaches are heretofore set forth, plaintiff is

entitled to all of defendant's interest in the coins that were in the locks described in paragraph seventh of this complaint on April 23, 1923, and that have since been deposited therein, which said interest is fixed as plaintiff's liquidated damages by paragraph 9 of said 'Exhibit A,' and amounts, as plaintiff is informed and believes, and on said information and belief alleges the fact to be, to the sum of twenty-five thousand dollars ($25,000.00). That it would be and was and is impracticable or extremely difficult to fix the actual damages so fixed as liquidated damages.

"Wherefore, plaintiff prays:

"That it have judgment for the sum of one hundred thousand ($100,000.00) dollars, the value of contracts described in paragraph seventh hereof; for the sum of four thousand five hundred and seventy-five ($4,575.00) dollars for the value of locks retained by defendant as alleged in paragraph eighth hereof; for the sum of twenty-five thousand ($25,000.00) dollars for the value of defendant's interest in the coins described in paragraph ninth hereof; and for costs of suit and for such other and further relief as to the court may seem just."

An analysis of the appellee's complaint discloses three alleged grounds for damages.

1. The value of the lease contracts between the appellant and other persons covering locations; in other words, the value of the lock locations.

2. The value of the locks themselves alleging 183 locks in the possession of appellant at a value of twenty-five ($25.00) dollars each.

3. Twenty-five thousand ($25,000.00) dollars as liquidated damages.

The judgment rendered by the court is for the rental value of 604 locks at $5.00 per lock or $3020.00, but without costs. Nowhere in its complaint does appellee allege more than 183 locks to have been in the possession of the appellant and fails to allege any rental for the same, but demands judgment for the reasonable value of the locks. It was stipulated at the trial that all of the locks had been returned by April 23, 1928, and so found by the court in finding No. IX.

Damages flowing from the breach of the contract resulting in the loss of the rental value of the locks is a form of special damages which must be specially pleaded as such before evidence can be introduced on the subject as a basis for recovery.

Under Section 724 of the United States Judicial Code the rule is well settled that:

> "In action at law, the sufficiency and scope of pleadings are matters in which the Federal Courts of the United States are governed by the practice of the courts of the state in which they are held." 28 U. S. C. A. Sec. 724, p. 36, and supporting cases.

Glenn v. Sumner, 132 U. S. 152, and in Central Vmt. Ry Co. v. White, 238 U. S. 507, 511, it was said:

> "There can * * * be no doubt of the general principle that matters respecting the remedy—such as the sufficiency of the pleadings * * * depend upon the law of the place where the suit is brought."

The purpose of the section is stated in Liverpool etc. Ins. Co. v. N. & M. Friedman Co., 133 Fed. 713, 716, as follows:

> "That the object of the section was to assimilate the form and manner in which parties should present their claims and defense, in the preparation of the trial of suits in the federal courts, to those prevailing in the courts of the state."

Even with these general principles to guide us the rule is apparent, but we have before us a case which decides the very point in issue here, namely, the case of Monarch Tobacco Works v. American Tobacco Co., 165 Fed. 774, in which it was held that where the practice in a state is that if the damages claimed are such as would usually or naturally accompany or follow or be included in the results of the injuries complained of, they may be stated or claimed in general terms, but that other and further damages can neither be proved nor recovered unless expressly averred and shown, such practice will be followed in a federal court sitting in that state.

In other words, special damages must be properly alleged before they can be proved and recovered.

Under the general principles laid down by the cases *supra* it naturally follows that if the practice of the state court requires special damages to be pleaded specially before proof and recovery thereon the federal courts must apply the same rule. With this in mind we turn to an examination of the rules of pleading practiced in the state of California as the California rule governs in this matter. The general proposition that special

damages must be specially pleaded before proof and recovery is well expressed in 8 Cal Juris. 889, Sec. 127, as follows:

> "Special Damages.—The defendant cannot be presumed to be aware of the damage naturally, though not necessarily, resulting from his act, and therefore, in order to prevent a surprise on him, this sort of damage must be specially set forth in the complaint, or the plaintiff will not be permitted to give evidence of it. Notwithstanding the fact that the code fixes the limitations of recovery as a measure of general damages common to actions for breaches of certain contracts, it is a well-recognized rule of law that recovery may be had for damages not covered by the general liability for breach of contract, where facts are specifically pleaded showing that the injury was one reasonably within the contemplation of the parties. The facts as to special damages must be stated with particularity, the amount of such damages must be given, and the means of occasioning them must be set forth. Whenever the special damages do not all flow from the same facts, but depend upon proof of different circumstances, the grounds of each claim should be alleged. An allegation that by reason of the breaches of contract the party has been damaged in a named sum, is not enough.
>
> "It is only damages which are not the necessary result of the injuries complained of which must be specially pleaded. Where the gist of the action is special damages, and these are inadequately pleaded, only nominal damages can be had."

This rule is supported by a host of authorities, among which are the following:

Huyler's v. Ritz Carlton Hotel etc., 2nd Fed. 404;
17 C. J. 1002, Sec. (306) 307;
Roberts v. Graham, 18 L. Ed. 791;
Martin v. Pac. Gas & Electric Corp., 52 C. A. D. 882, 889;
Gavey v. Reed, 178 Cal. 749;
Mills v. San Diego Conservatory of Music, 47 Cal. App. 300;
Cohn v. Bersemer Gas Engines Co., 44 Cal. App. 85.

Having established the proposition that the federal court sitting in this district must follow the rules of pleading established in California courts, and having further demonstrated that both Federal and California law require that special damages must be specially pleaded in every particular, we naturally come to the question of what are special damages.

In the case of Martin v. Pacific Gas and Electric Company, cited *supra*, the court, at page 889, defines special damages as follows:

> "Special damages are those which are the natural but not the necessary, result of the act complained of, and not being implied by law must be specifically pleaded and proven."

In the case at bar the appellee was awarded the rental value of the locks for the second half of 1923. The loss of the rents for the locks for the second half of the year 1923 was a natural but not necessary result of the alleged breaches of the contract by appellant. In fact,

the appellee fails to allege anywhere in its complaint that the appellant refused to pay the rents due on the locks. There is nothing in the pleadings to show that the appellant ever failed to pay the rents due under the contract, *non-constat*, but all the rents due were paid.

The loss of rents was not the necessary result of the breaches alleged by the appellee, and that the appellee did not think so, is apparent from the fact that it did not even take the truble to plead loss of rents, but contended itself with pleading a conversion of 183 locks by the appellant and set the reasonable value of the same at $25.00 per lock.

Conceding for the sake of argument that the contract was terminated as found by the court on the 30th day of December, 1923, by the notice given on July 1st, 1923, it did not necessarily follow that the rents due for the second half of the year 1923 would not be paid on the locks in the possession of the appellee at the date of notice of termination on April 23, 1923. And unless it followed necessarily and as a matter of course, that upon the breach of the contract by the appellant the rents on the locks would not be paid, the recovery of such rents must be by properly pleading the loss of rents as special damages.

Illustrations of special damages are found in 8 Cal. Juris., 751 Sec. 21:

> "Illustrations of Special Damages.—Damages for breach of contract which are special in their character include such as the following: Loss of rents resulting to the owner from a contractor's failure to complete a building in time; damages claimed by

a purchaser solely on account of the seller's delay in delivery; damages for the breach of a warranty of fitness for a particular purpose, as prescribed in Section 3314 of the Civil Code; expenses incurred by a vendee in examining title and preparing papers, following the vendor's breach of agreement to convey land; attorney's fees, provided by a contract to be paid in case of suit for its breach; attorney's fees paid by an owner in freeing his building from mechanics' liens which the contractor had allowed to be filed in violation of the building contract; attorney's fees and other expenses incident to procuring a release from false imprisonment. And where one agrees to buy land at tax sale and hold it in trust for the owner, but violates the agreement by selling the certificate of sale to a third person who sues the owner to quiet title, counsel fees and other expenses incurred by the owner in defending the suit are special damages. Likewise, where a contract to construct a railroad across the land of one of the parties and to the center of an adjacent city is broken, the damage resulting to the land owner from the deprivation of the convenience of communication with the center of the city is in the nature of special damages."

To the same effect is Howard Supply Co. v. Wells, 176 Fed. 512.

In every jurisdiction, whether state or federal, the rule is followed that special damages must be specially pleaded by setting up the facts showing how the injury occurred, and the nature and extent of the loss resulting from the breach of the contract.

In the instant case the appellee fails to allege any loss of rentals and the law will imply none. Having

failed to allege any special damages the appellee was precluded thereby from introducing into evidence any proof as to loss of rentals on locks and it was error for the court to admit any evidence to prove the rental value of the locks for any period of time.

Not only did the appellee fail to allege special damages as to the rental value of the locks, but it failed to allege any general damages.

Under the definitions of general and special damages, the allegation of damages contained in the seventh paragraph of appellee's amended complaint, allege special damages in the sum of $100,000 for the loss of contracts procured by the appellant for its own business. Certainly the alleged loss of these locations could not constitute general damages flowing from the alleged breaches of the contract between appellant and appellee. For if the lock locations were rightfully the property of the appellee (which they were not) to revert to it only on the breach of the contract, how could the loss of the same necessarily and naturally flow from the breach. In other words, the breach of the contract by the appellant was a necessary condition precedent to the right of the appellee to the lock locations.

Paragraph eighth of appellee's complaint also sets up special damages alleging the loss of locks and the value of the locks. It is clear that a breach of the contract would not naturally and necessarily result in the loss of these locks.

Paragraph ninth is an attempt to allege liquidated damages and hence could not possibly be construed as an allegation of general damages.

In the prayer the appellee segregates the items of damages as special damages, but makes no allegation of general damages. Hence we find that all of the allegations of damages and the prayer are for special and not general damages and the appellee is barred from even attempting to justify its award of $3020.00 under the guise of general damages because there is no allegation of general damages. Having carefully and expressly delineated the special items upon which it bases its recovery and having assigned to each item special damages of fixed amounts, the appellee is precluded from recovering for items not set out in the complaint nor contained in the prayer.

II.

By Failing to Allege the Loss of the Rental Value of the Locks, Either as General or Special Damages, the Appellee Was Precluded From Introducing Any Evidence as to the Loss of Rents From the Locks.

The cases cited *supra* all hold that the proper pleading of damages is a necessary prerequisite to the introduction of evidence to prove the same.

The only allegation in the complaint referring to the number of locks in appellant's possession at the time of the alleged breaches is paragraph eight of said complaint which fixed the number at 183. Under the terms of the agreement appellant has allowed 100 locks free which would reduce the number of rent locks to 83. At the trial the appellee, over the objection of the appellant, [See Tr. p. 536, and assignment of error No. 13, Tr. p. 663], introduced a document numbered Plaintiff's Ex-

hibit 21 [Tr. p. 536] which purported to show the number of locations under contract with the appellant. The number of locks shown by this document to be in the possession of the appellant on April 23, 1928 was 604 locks. This number was in excess of the number alleged in the complaint to wit: 183 locks. The appellee made no application to the court for its order permitting it to amend the complaint to conform to proof and at the time the findings of fact and conclusions of law and the judgment was signed this variance between proof and allegation remained and amounted to a judgment in excess of and different from the prayer which constitutes reversible error; for a recovery for rent is not the same cause of action as a recovery for the value of the thing rented. The rule is well stated in Meisner v. McIntosh, 76 C. D. 213, 214, as follows:

> "By the complaint the plaintiff sought to recover damages for fraudulent representations made by the defendants whereby he was induced to convey certain real property of the fair market value of $1,000.00. There was evidence produced at the trial to the effect that said real property was of the fair market value of $1,525.00. The trial court found in accordance with this evidence and rendered judgment in favor of plaintiff for this amount together with other amounts hereinafter referred to. No amendment to the complaint to conform to this evidence was made or filed. Appellants contend that as the plaintiff alleged that he was damaged only in an amount of $1,000.00, it was error for the court to find, and upon such findings to award a judgment in the sum of $1,525.00, or in any amount exceeding the sum of $1000. In this we think appellants

> are right. The authorities overwhelmingly support appellants' contention. 'The rule is firmly established that irrespective of what may be true a court cannot decree to any plaintiff more than he claims in his bill or other pleading.' "

Where the case proved is found to be essentially different from that presented by the pleadings there is a failure of proof and the defendant is entitled to a non-suit. The rule is well stated in 21 Cal. Juris. 267, Sec. 185.

> "Failure of Proof.—Where the allegation of a claim or defense to which the proof is directed is unproved, not in some particular or particulars only but in its general scope and meaning, there is not a case of variance, but a failure of proof. So, if the case as proved and found is essentially different from that presented by the pleadings, there is a failure of proof and a defendant is entitled to a non-suit or to the reversal of judgment against him, even though the objection might have been obviated by amendment. In an action upon a note alleged to have been executed to a firm, proof that it was executed to and is due to one of the partners constitutes a failure of proof. Likewise, where the complaint alleges an agreement to pay a designated sum of money for services and the evidence discloses that the contract was that plaintiff should accept a certain number of shares of stock in full compensation for such services, there is a failure of proof."

In the case at bar the appellee introduced Exhibit 21 to show the value of the subleases (not the rental value of the locks) and the court used it as a basis for computing the rental value of the locks for the last half of

year 1923 [illegible] filed to even deduct the 100 locks [illegible] were allowed rut free. There was no allegation [illegible] the rental value of the locks and the court per- [illegible] proof of [illegible] used to compute the rental value [illegible] locks. [illegible] complete failure of proof of [illegible] the [illegible] to [illegible]. Paragraph eight of ap- [illegible] complaint [illegible] attempts to recover the actual [illegible] of 1853 [illegible] the court gave it judgment for [illegible] actual value [illegible] locks, even though the contract [illegible] provided that [illegible] have 100 locks rent free, [illegible] reverse the judgment.

[illegible] stipulated by the parties [illegible] at the trial that all of [illegible] to the appellee, a re- [illegible] paragraph eight of its com- [illegible] the pleadings and the complaint [illegible] paragraph eight [illegible] could the court have [illegible] to show the value of [illegible] this would clearly be [illegible] Judge Bledsoe and

[illegible] which it could have [illegible] Exhibit 21 rested [illegible] and judgment [illegible] was prejudicial [illegible] denied the motion [illegible] was unable to make [illegible] the evidence Exhibit [illegible] the number of locks [illegible] 21, 1923.

It is well settled that where evidence is admitted over the objection of the advere party, that it is irrelevant and not within the issues, it is reversible error where the admission of the same is pejudicial to the rights of the party objecting.

> "Evidence confined to material allegation. Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collatera questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into collateral fact, when such fact is directly connected with the question in dispute, and is essentil to its proper determination, or when it affects the credibility of a witness."

Mitchell v. Beckma, 64 Cal. 116;
Coonan v. Lowentil, 129 Cal. 197;
Estate of Boyes, 11 Cal. 143;
Martin v. Pac. Gs & Elec. Corp., 52 C. A. D. 882;
10 Cal. Juris. 797.

Where the evidence admitted is a basis of the court's decision and judgment and there is no request made or leave granted for an amendment to conform to proof, the action of the court in giving judgment for damages imputed on the basis of the irrelevant testimony and not pleaded is a combination of errors, any one of which would reverse the judgment.

Evidence admitted for a special purpose over objection to its admissibility cannot subsequently be used for another and different purose irrelevant and not within the issues.

Estate of [illegible] *supra;*
21 Cal. Ju[illegible] Sec. 185.

the year 1923, but failed to even deduct the 100 locks which were allowed rent free. There was no allegation as to the rental value of the locks and the court permitted proof which it used to compute the rental value of the locks. Here was a complete failure of proof of any of the issues of the case. Paragraph eight of appellee's complaint was an attempt to recover the actual value of 183 locks and the court gave it judgment for the rental value of 604 locks, even though the contract provided that appellant was to have 100 locks rent free; this fact alone is sufficient to reverse the judgment.

In view of the fact that it was stipulated by the parties in open court at the beginning of the trial that all of the 183 locks had been returned to the appellee, a recovery of the appellee under paragraph eight of its complaint was certainly out of the question and the complaint from that time must be considered as if paragraph eight did not exist. Upon what theory could the court have admitted Exhibit 21, certainly not to show the value of the subleases and contracts because this would clearly be error in the face of the decision of Judge Bledsoe and the findings of the trial court.

There was no possible theory upon which it could have been properly admitted and upon this Exhibit 21 rested the whole basis of the court's decision and judgment.

That the admission of this exhibit was prejudicial to the rights of the appellant cannot be denied for without this exhibit the court would have been unable to render the judgment it did. In the state of the evidence Exhibit 21 was essential to a computation of the number of locks in the defendant's possession on April 23, 1923.

It is well settled that where evidence is admitted over the objection of the adverse party, that it is irrelevant and not within the issues, it is reversible error where the admission of the same is prejudicial to the rights of the party objecting.

> "Evidence confined to material allegation. Evidence must correspond with the substance of the material allegations, and be relevant to the question in dispute. Collateral questions must therefore be avoided. It is, however, within the discretion of the court to permit inquiry into collateral fact, when such fact is directly connected with the question in dispute, and is essential to its proper determination, or when it affects the credibility of a witness."

Mitchell v. Beckman, 64 Cal. 116;
Coonan v. Lowenthal, 129 Cal. 197;
Estate of Boyes, 151 Cal. 143;
Martin v. Pac. Gas & Elec. Corp., 52 C. A. D. 882;
10 Cal. Juris. 797.

Where the evidence admitted is a basis of the court's decision and judgment and there is no request made or leave granted for an amendment to conform to proof, the action of the court in giving judgment for damages computed on the basis of the irrelevant testimony and not pleaded is a combination of errors, any one of which would reverse the judgment.

Evidence admitted for a special purpose over objection to its admissibility cannot subsequently be used for another and different purpose irrelevant and not within the issues.

Estate of Boyes, *supra;*
21 Cal. Juris. 267, Sec. 185.

In concluding this branch of the case it might be well to call the court's attention to the well known rule of law that when a complaint fails to allege special damages and fails to prove or allege general damages the plaintiff is only entitled to nominal damages provided the complaint states a cause of action.

III.

The Court Erred in Giving Judgment for the Appellee and Should Have Given Judgment to Appellant on Its Counterclaim.

Under this heading the first question to decide is whether or not the appellee in any way breached its covenants and acted promptly in bringing this suit.

Finding No. VI of the amended findings [Tr. p. 39] is as follows:

> "That under the terms and conditions of said contract the plaintiff guaranteed its lock as to material, workmanship and repair and agreed specifically to lease defendant additional locks as needed. Plaintiff failed from time to time in living up to its agreement. The defendant, however, did not take advantage of these situations as they arise from time to time."

Finding No. X is as follows:

> "That plaintiff acted promptly and immediately brought suit against defendant for damages for breach of contract."

And from these findings the court comes to the following conclusion found in conclusion of law No. I:

> "That as the defendant did not take advantage of the failure of the plaintiff to furnish to it locks as needed as these situations arose, defendant by its conduct condoned them and the plaintiff acted promptly when the defendant terminated the contract which in its judgment gave it cause for complaint, while on the other hand the defendant by its course of conduct in the face of complaints substantially condoned the faults of plaintiff."

Did the appellee substantially comply with its contract? The appellant most emphatically contends that the plaintiff not only did not substantially comply with its contract, but that it committed a breach of the contract because of which breach the defendant gave notice of termination on April 23, 1923.

The court finds that the appellee shipped locks from time to time, or, in the words of the court, "That at various and sundry times from and after the said February 23, 1915, plaintiff delivered to the defendant, Pacific Coin Lock Company, large numbers of coin locks * * * to be used by said defendant, Pacific Coin Lock Company, in accordance with the terms and conditions of the aforesaid contract.'

We pause here to point out to the court that this finding does not find that the appellee delivered locks in accordance with the terms of the contract, but that the plaintiff delivered locks to be used by the defendant in accordance with the terms of the contract. The defendant was to use them *in accordance* with the terms of the contract.

This cannot be construed to mean that the appellee complied with its contract because the following finding of fact No. VI recites that the appellee breached the contract

However, even if the appellee had promptly shipped the locks as needed by the appellant upon its orders, still this would not constitute substantial performance, because the contract also provided that the locks were guaranteed by the appellee as to material and workmanship, and unless the locks were made of the proper materials and contained the proper workmanship the plaintiff failed to perform.

The appellee admitted that all of the parts were not interchangeable and not properly machined. Delbert Cosby and his brother, Halley Cosby, witnesses for the appellee and in its employ, admitted that they had to work on the locks before installing them and that the parts were not interchangeable and had to be worked over before they fitted.

[Tr. p. 559]:

"Q. I call your attention to this language: 'The parts are not standard. Tried to change some cases and knobs, but was out of luck.' Was that one of the troubles you found with the locks?

"A. Those locks I could not change without putting on new locks.

"(Witness continuing): The parts were not standard,—this is, you couldn't always interchange one latch with another one. I didn't find that to be true of all of them.

"Q. I will call your attention to this language, and will ask you to look at the bottom of the page, beginning at the words,—'Several little defects and believe me I mentioned them in writing Malsbary,—' He was the secretary of the Coin Controlling Lock Company?

"A. He was.

"Q. (Continuing reading): 'No use putting on these new locks until they are right, but I begin to think they never will get them right, and about the only lock on the market that is right is the Pawtucket lock, and it's too bad we are not using it.' What did you mean by that?

"A. I always had great praise for the Pawtucket lock.

"Q. What did you mean by the phrase, 'I think they will never get them right'?

"A. I was very much in favor of the Pawtucket lock, and thought they were making somewhat of a perfect lock.

"(Witness continuing): I never said the Coin Controlling Lock Company's lock would not be right. I never said it either verbally or in writing that I recall.

"Q. Now, I will call your attention to this language: 'The locks did not get here until about noon today, and I had to go over all of them, and when I got through packing, etc., the day was gone.'"

And to the same effect is the letter of Van Cleave, president of the appellee company, thanking the appellant for pointing out to appellee the glaring defects in its locks both as to material and workmanship.

Mr. Hervey, one of the best experts in the Coin Lock business, testified on the stand that the locks furnished the appellant by the appellee were made of the wrong materials, not machined nor properly constructed.

Mr. Hervey pointed out that the back of the lock being aluminum sprung if the door was warped or was slammed

shut, causing the parts to bind and subsequent failure of operation. [Tr. pp. 478-487.]

"My name is Lee Hervey. I reside in Baltimore, Maryland. I am connected with the General Service Company. The business of that company is manufacturing coin locks. We also distribute them. The place of business of that corporation is Baltimore, Maryland. The territory occupied by the company is national and international. Our factory is in Pittsburg, Pennsylvania.

"I have been in the coin lock business since 1910. My first connection with the coin lock business was an operative contract with the American Sanitary Lock Corporation, Indianapolis, in 1910,—in which they furnished coin locks, obtained the locations, installed in, operated in, and they received 50 per cent of the income. In 1912 I operated some locks made by the Itaska Company of Chicago, which I purchased outright. They were not successful, and I organized and took over in 1917 or 1918 the General Service Company, and started building our own equipment, installing and operating it, which we are doing today. During that time, I have familiarized myself with practically every lock manufactured in this country, including all the records and patents on them, going back to 1874. I have made studies of the coin lock business. The first two locks installed were installed around 1903. They were manufactured in England. They were brought here and installed in Boston. The first locks of American manufacture were installed around 1905 or 1906, by the Pawtucket people, I believe. I am familiar with the Pawtucket lock. I have made a study of the construction of coin locks.

Q. By Mr. Newby: I show you Plaintiff's Exhibit A-9, and ask you if you have made an examination at our request of that lock? A. Yes, and previous to your request.

Q. You have examined the locks of the Coin Controlling Lock Company, or the Michigan Coin Lock Company? A. A great many of them over a period of years.

(Witness continuing): I have familiarized myself with the locks they distribute.

Q. And can you tell from an examination whether that is one of them? A. That has no name on it, but it looks very much like one; I would say, yes.

Q. By Mr. Newby: I will ask you to examine it and see if it has any indication of having all the parts that are usual in locks put out by the Coin Controlling Lock Company and the Michigan Coin Lock Company. A. At that time, yes—along around 1917, 1918 and 1919, 1920 and 1921.

(Witness continuing): They have put out about ten different locks that I know of, and possibly more.

Q. If you will, just describe to the court the construction and wherein there are any defects. A. The defects are in the material used.

(Witness continuing): It is a soft aluminum, and a rule of mechanics is that soft aluminum working against hard brass, which is a harder metal, will wear until it becomes loose, and as it becomes loose it allows play between the parts. This particular lock is a fairly well complicated lock of its particular type. Fundamentally, from the standpoint of the manufacturer, it can never be satisfactory, because it is a combination of one hard metal with a soft metal without any bushing.

The Court: Let me interrupt. The warranty of the contract is workmanship and material, is it not?

Mr. Newby: Yes.

(Witness continuing): The grades of brass in this lock are different, some are about 30 per cent copper, and I should judge the others are about 22 per cent, which is a question of difference in hardness and softness.

Q. By Mr. Newby: Will you please indicate the portions that are of different metals that you describe? A. This templet of the handle arm, and ward, which is the sliding bolt of this arm, a very important factor,—this is very soft. Do you want me to demonstrate how soft it is?

Q. You say this, What are you referring to? A. The sliding ward. Would you like for me to demonstrate how soft this is?

(Witness continuing): Any piece of metal to stay in shape, ought to be of hard construction, so it won't flex in the slamming of doors or putting in the coin. That little tiny piece has to carry the pressure of the coin between the two slots that allows the handle to turn, to move the coin over and move this ward back and forth,—the combination of the two slides.

Q. By Mr. Newby: Now you have heard some witnesses describe an operation that is quite frequent, that it would jam and lock the party in the toilet. Will you explain to the court how that result would follow from the use of that lock? A. This flexible ward that I explained to you here, will bind and one coin can get in here, and if there is a little softness another coin can get on top and jam and the mechanism cannot be moved, because that is the movable part of the top, and this is the immovable,

and if you can't move them together, that ward is locked.

Q. And that is the effect of the lock part inside? A. Yes. In other words, in this construction of a coin lock, the coin acts as a wedge between the two, and in the general construction of locks today, it does not act as a wedge, merely as a pall, it slides in and the pressure does not come on the coin.

Q. In this particular lock, pressure does come on the coin? A. Yes, there is the lower half of the nickel, and that is the upper half of the nickel. That is the position the nickel goes in. In turning this handle, this comes in contact with the nickel, this arm coming up, and if that bends and doesn't come in contact, you don't move. That goes over and comes in connection with the ward and that takes this ward along,—watch it go in. (Demonstrating.) That is all the action.

Q. By the Court: I take it what you desire to say is if there is a defect and if the brass is too soft that is what will happen? A. That is one of the defects.

Q. By the Court: Is brass essential to that construction? A. No, any hard metal would have sufficed. Brass is usually used of a proper consistency, because of its easy milling.

(Witness continuing): Brass is non-rustable, non-corrodible. Aluminum is the reverse. This piece is aluminum, cast, and could be polished up just as nice as anyone would want to see it, but it won't stay so, and very few lock manufacturers of the better grades of locks use aluminum. They use brass, or steel; preferably brass. Steel is much cheaper than aluminum.

Q. By Mr. Newby: What would be the advantage of using aluminum over steel? A. Because you couldn't polish steel like aluminum; you would have to nickel plate it and would have to copper plate it and that would cost more than aluminum.

(Witness continuing): That would cost more than aluminum and it would be much harder to work. Aluminum and brass are the two simplest castings to make. They don't require the same extreme heat to melt. They are harder to work. These are easy to work. Aluminum and brass work four times as easily as the harder metals.

Q. By Mr. Newby: Will you also continue in your detailed examination of this lock with reference to the machining? A. There is practically no machining in this lock.

(Witness continuing): Machining means fitting. That is universal, so one can be taken out and another put in the same place. Ford car idea, everything interchangeable. In a business of this kind it is quite essential to have standard parts because to talk about having a coin lock, like we have, 1500 in Siam and they order parts and when they get there they are not usable, they might as well not order them.

Q. By Mr. Newby: As a practical matter the parts not being interchangeable, what does the operator have to do? A. He has to mill them and file them and scrape them and do everything else until it does operate.

(Witness continuing): Sometimes they never operate.

Q. Is that proper workmanship? A. No, sir, it is not proper workmanship. It is very crude, pitifully crude.

Q. With reference to that latch, you said pitifully crude, and you looked at something else,— A. I am not trying to pick it to pieces, just looking at the general construction of it; the whole thing is crude.

Q. With reference to that latch there, the part that goes into the door, do you notice any defects there? I don't know whether I have the correct name. That there (indicating). A. That is termed by different names. Some people call it the latch and some call it the ward. This is hand filed, I can see that. It is not a fabricated piece of metal. It is like the barn door latch, they will keep on working if you keep on working on them.

Q. As to the weight of that metal upon which the inside is attached, does that have anything to do with the operation of the lock? A. No, the weight of it wouldn't have much to do with it; the tensile strain would.

Q. In what respect? A. That it couldn't flex. The second this is put up and screwed up on the door, if this back flexes out of line, everything in it binds.

Q. By the Court: In other words, rigidity would be the converse? A. Yes, it binds.

Q. By Mr. Newby: Now with reference to that particular lock, what would you say as to the probability of it becoming flexed? A. You tell me not to do anything to the lock that will affect it, and I am liable with the slightest demonstration to prove it flexes, and then it is of no value.

(Witness continuing): I don't know the strength of the metal but I can bend it right in my hand.

I have seen many of these locks in which that case has been bent. I would say that is one of the de-

fects in the workmanship of that lock. It is a combination of both workmanship and material. The material was wrong to start with, and then there was no workmanship put on it. It is a common, crude casting.

Q. By Mr. Newby: I will ask you again whether or not you ever saw any of the castings of the Coin Controlling Lock Company or the Michigan Coin Lock Company upon any occasions, and if so where? A. In the office of the Pacific Coin Lock Company.

Q. And what did you observe with reference to those parts? A. Those castings were sent out here, that I saw here, were common, crude castings without any machining whatever. For instance, that is a casting. It has been machined in two or three places. Those I saw here had not been machined in any way, and they had to be worked on. I should say by handwork two hours to each one to first go into the lock. In other words, they were castings from a foundry, sent just as cast, not finished up.

Q. Would you say that was good workmanship? A. Absolutely improper.

Q. You have heard some testimony here, Mr. Hervey, with reference to the difficulty in opening,—that they are easy to open. Does that apply to this lock or some other lock? A. You mean to open the door?

Q. To open that without putting in a nickel? A. Yes, it is very easy, very simple. You can take a knife.

Q. In what respect? A. You can go behind it. The chances are you can open them through the slot. I can do it with my knife. I can flex it with my knife.

Q. Now what preventive measures are used on other coin locks to avoid that, if any? A. Guards are mounted around here and cast in, top guards on top for swing-in locks, and face guards on the face of swing-out locks, that protects against any possibility of rifling. An entirely different principle in the modern lock is that it makes no difference what you put in the top there it shifts the palls.

Q. By the Court: By modern, what do you mean, the period of that lock? A. Yes.

Q. By Mr. Newby: Were these kind of locks you describe as modern put out as early as this lock? A. Oh, yes, the Pawtucket lock was put out in 1911. That is a very good lock. Mr. Van Cleave knows that, because he used a great many of them in leased locations.

(Witness continuing): Our company furnished Mr. Van Cleave some of our locks. In 1922 and 1923 I should say that the Pawtucket people and ourselves furnished them around 600 on lease at $1.00 per lock per month,—the Pawtucket much the larger number, because at the same time we were furnishing the other company in the Service Utility Company, the American Sanitary Lock Company, which also have a lock of this inferior manufacture, 2200. In other words, they were taken off and this other lock put on.

Q. By Mr. Newby: Would you say, Mr. Hervey, that it would be profitable as a business proposition to successfully operate locks of the type of this one that you have just examined, except at very great cost and expense? A. It could not be done: it could not be done profitably I think."

Both appellee and appellant admit that one of the best locks on the market during the period that appellant was using appellee's locks was the Pawtucket lock, the case of

which was made of steel and nickeled. The locks of the appellee was constructed with an aluminum case with bronze and brass parts working against it.

The aluminum, being softer, wore away allowing play in the working parts and consequent jamming of the locks. This was true of all the locks sent by the appellee and caused the defendant so much trouble that it had to hire a corps of men to nurse these locks along so that the patrons could use them at all.

The record is full of incidents where users of the toilets were locked in by the locks jamming and had to be helped out. And in some cases the patrons forced their way out, smashing the door and the lock.

[Tr. pp. 68-70]:

> "My name is Albert Mallory. I reside at 1500 E. 23d street, Los Angeles. I am employed by the U. P. Railway Company. I expect to leave the city tomorrow for Chicago, and be gone about eight days.
>
> In the year 1919, and the early part of 1920, I was employed at the Hayward Hotel. The Hayward Hotel is located at the southwest corner of 6th and Spring streets, Los Angeles, California. During the time that I was there there were coin locks on the doors of the toilets in the washroom of the Hayward Hotel. I came there in 1919. The locks that were on those doors were the Pacific Coin locks. My observation during the time I was there with reference to those locks was that the locks were no good, we had quite a number of complaints. The gentleman who has charge of the coin locks told me to keep down as many complaints as possible in the office. The coin would get clogged in the lock and you could not use it; several guests they would go in and they could not

get out; several guests got out over the doors, and they locked the doors and they would have to use a key to get out and I got several guests out over the doors, and sometimes they would lock people in there so many complaints would happen in the office.

Q. By the Court: Did you receive any complaints? A. Yes.

Q. By the Court: How many? You must not testify as to what they told you in the office, but of what you received yourself. A. So many times people would put 5 cents in the locks and they could not get results; it would not open the door and they could not get it; that would be times when I would not be in there.

(Witness continuing): Every day I would come back and find money in the locks, and they never could get results and a number of times I would let them in with my key because the locks would not work. I could not say how many were locked in during the time I was there. It was a frequent occurrence. Those locks were finally taken off by the engineer of the hotel."

[Tr. pp. 470-472]:

"My name is James White. I live at 1578 East 23rd street, Los Angeles. I have charge of the wash room concessions at the Alexandria Hotel and a number of other places. I have worked for the Pacific Coin Lock Company in San Francisco. I had charge of the wash rooms on the concessions at the World's Fair. I was the head man there. I was at the Alexandria Hotel in 1919 and I am still there. I recall that sometime in the summer of 1919, there were coin locks installed by the Pacific Coin Lock Company at the Alexandria Hotel. We were constantly having trouble with the locks installed by the Pacific Coin

Lock Company at the Alexandria Hotel. People would come in and put nickels in and they would get jammed and they could not get in them lots of times; they could not get in the toilet because the nickel did not work; and lots of times when they did get in they could not get out easily. There were lots of times we had to help them get out, after they would get in there they could not unlock it from the inside so they could get out. And we would hand them a chair over inside of the toilet, so they could stand up on it, and set a chair on the outside so they could crawl over the door and get out that way. We had lots of trouble that way. It was quite a common thing for that to happen. I wouldn't say it happened every day, but sometimes it would happen two or three times in a day. We had difficulties about the nickels jamming, so they couldn't get in. That was very frequent, where the nickels would jam; that would happen sometimes 20 times a day. I reported to the Pacific Coin Lock Company about the condition of those locks. I used to keep a telephone where I could always go and call them up and tell them about the trouble we were having. They would send men down, and sometimes I would have to telephone them to come and get people out. I think we would always have them out, though, before they could get there, by using the chair system.

Q. By Mr. Newby: Now, do you know about the removal of those locks in February, 1922, from the Alexandria Hotel? A. Yes, the management got so disgusted that they took the locks out, had them taken off. They took those locks out, and later on put some more locks on, a different kind of lock.

(Witness continuing): Mr. Hammond, the manager of the hotel, ordered them out. That was because of the trouble we had had with the locks and numer-

ous complaints that would go up to the office about the locks. Customers would come in and get so angry they would go upstairs and report it, and they were continually reporting those things, and Mr. Hammond got disgusted and had the locks taken out."

[Tr. pp. 473-475]:

"My name is R. F. Shinn. I live at Burlingame, California. I am manager at San Francisco for the Pacific Coin Lock Company. I have been with the Pacific Coin Lock Company since February, 1922. I was first located in Seattle. I arrived in San Francisco Thanksgiving Day of 1922, and took over the business on the first of December. In Seattle I was everything in connection with the business, collector, and installed the locks and removed them. I am familiar with the locks installed by the Pacific Coin Lock Company at Seattle.

Q. In a general way, what particular places were locks installed? A. We had about five hotels; we had the business of the city; we had two stage line depots; we had one lock in the railroad depot; and a few scattering locations.

(Witness continuing): There were no other employes of the defendant in Seattle besides myself. We had difficulties with the operation of the locks installed by the defendant corporation in Seattle. The lock was mechanically defective, the old 'A' lock, and later the 'C' lock. The bolt, to be specific, was about half cut in two, and on a heavy door, where the door was slammed, it would very often crimp that bolt a little, and the nickel would jam and lock men in the toilet. That happened very frequently. That was the worst trouble, that bolt locking persons in the toilet; but the parts were not interchangeable. I would go out to take a lock and find a bolt that did not fit, and have

to go back and maybe have to take a half dozen over there. The latches were not interchangeable. The same latch bolt wouldn't interchange with the one that was in the lock.

Q. By Mr. Newby: What other difficulties did you have besides this locking in? A. Well, one trouble was they didn't have any protection to the keeper, and they would take and open it up with knives and nails, etc., and very often jam that bolt with a rough nail or file, and then she would stick.

(Witness continuing): All locks, I think, nowadays have them, all protected from such depredations as that. The keeper has protection, top and bottom, thoroughly encases the bolt, so it is difficult to get to the bolt, although some of them can still be operated with handkerchiefs and things of that kind.

Q. These difficulties that you had with the locks in Seattle, did any complaints come to you from users of the locks? A. Constantly. The Butler Hotel being the worst.

(Witness continuing): The trouble got so persistent that they threatened to take them off. The trouble was with these mechanical defects in the locks; particularly with this bolt jamming and locking people in. I went over there very often—in fact, one time I remember going over there and helping people out of the toilets. That is the hotel (the Butler) that Cohen used to run.

Q. By Mr. Newby: Did you have to help them over the top? A. Yes, in this case, he wouldn't crawl under. The boys generally tried to get them to crawl under, and sometimes they wouldn't on a very dirty tile floor.

(Witness continuing): When I went down to San Francisco my duties there were the same as at Seattle.

We had some business in Santa Cruz, and some in Sacramento. I supervised those. They had the same locks of the defendant. They used both 'A' and 'C' locks. We had the same experience generally in the locations in San Francisco as we did in Seattle, although I had gained some experience in the lock business and sometimes was able to devise methods to overcome that, where I had not in Seattle. The Fearless Bar on Market street, the Ensign Cafe, and the Waldorf on Market street, across from the Palace, were three of the very hard locations where we had constant trouble. At the Fearless Bar, it was this same latch bolt jamming, and either locking them in, or a man would get his nickel half way in and could not get in and would put another one in on top of it, and then in one or two cases we had to break the case to get it off to fix it.

Q. By Mr. Newby: Do you know of that being done? A. I have broken it."

Mr. D. L. Cosby, who was formerly with the appellant company, but who is now an employee of the appellee company, takes the stand and states that as long as he was with the appellant company they got all the locks they wanted, that the locks always worked well; that they never had to work on them much, but when confronted with letters he wrote concerning the locks he fails to remember what caused him to write them.

The following is typical of Mr. Cosby's testimony [Tr. pp. 602-603]:

"Q. By Mr. Newby: Now, as I understand you, Mr. Cosby, you testified in chief that you didn't know of any delay that had been occasioned by the failure of the plaintiff to furnish locks when ordered. Did

you? A. If my memory serves me rightly, I testified to the unreasonable amount of delays.

(Witness continuing): By unreasonable amount of delays I mean unreasonable length of time.

Q. And you do not now recall that there was ever while you were with the defendant corporation any unreasonable length of time in filling orders for the defendant. Is that what you mean? A. I do not remember.

Q. I call your attention to a letter dated December 10, 1919, purporting to have been addressed to Mr. G. W. Bannister, and ask you if you recall writing that letter to Mr. Bannister. Do you? A. Yes, sir.

Q. I call your attention to this language in the letter just referred to: 'In regard to your proposed trip through Sacramento, Stockton and Santa Cruz, will advise that at this time we will be unable to supply you with locks and equipment for making installations, as we are unable to get same from factory. However, we may arrange for you to take this trip some time in the near future, but are in doubt whether it would justify us in having you make same.' Now does that refresh your memory at all as to any delay? A. Some, yes.

(Witness continuing): I recall that there were times when we were unable to get locks from the factory.

Q. Don't you know there were times when that inability covered a period of as much as eight months from the time an order was put in before it was filled? A. I don't believe it ever did cover that length of time.

Mr. Newby: We ask that this be filed as defendant's exhibit.

The Court: It may be received and filed."

[Tr. pp. 617-621]:

"Q. I show you a document purporting to be a report, 'May 26, 1920, Report on Locks,' and ask you if that is in your handwriting? A. It is.

Q. And I call your attention to this item here, January 18, 1920, will you read that? A. (Reading): 'Lock at Alexandria Hotel, nickel wedged locking user in. Had to take door off to get user out.'

(Witness continuing): I don't remember where I got the information upon which I based that statement.

Q. Now I call your attention to this entry, May 28, 1920, will you read that? A. (Reading): 'May 28, 1920, changed two locks at Dennis Dance Hall, which were installed May 5, 1920. Continually out of order. Nickel control too wide, causing two nickels to pass each other and wedge.'

Q. Where did you get that information? A. I don't know.

Q. I will ask you to read the one of February 7, 1921, with reference to the Alexandria Hotel. A. (Reading): 'New locks at the Alexandria out of order. Nickel wedged. Fixed same before leaving place. One of same locks was put out of order for second (time) in one day.' I don't know whether it is second time or just what it is meant for.

Q. I will ask you to read the item of February 15, 1921, with reference to the Alexandria. A. (Reading): 'New locks at Alexandria changed. Continually out of order. Replaced by 3306.'

Q. I will ask you to read the one at the bottom of the page. A. (Reading): 'March 1, 1921. Man locked in at Alexandria. New lock. Had to stay in booth until I went in (D. L. C.) over and let him out.

Q. Well, that was a personal experience, wasn't it? A. Perhaps it was.

Q. You used the personal pronoun 'I'? A. I did.

(Witness continuing): It don't refresh my memory. I do not have any doubt about the truth of this entry. I imagine that was a condition or I wouldn't have wrote it if it wasn't the truth. In both of these pages they are in my handwriting. To the best of my knowledge it represents the facts as stated.

Mr. Newby: We ask that that be filed as an exhibit.

'Defendant's Exhibit No. A-31.

Report on Locks.

May 26, 1920.

May 26/20. Worked entire morning getting locks in shape for Barbara Worth Hotel at El Centro, which were supposed to be machinically perfect, when received by us from the Coin Controlling Lock Co.

May 28/20. Changed two locks at Venice Dance Hall which were installed May 5/20. Continually out of order. Nickel control too wide causing two nickels to pass each other and wedge.

Sept. 11/20. Lock #C3133 inst. 9/17/20 cash door in bottom out of order, nickels passed each other and wedged.

Lock #3129 inst. 9/7/20 one of the latest models, out of order, nickels pass each other & wedged.

Sept. 29/20. A3135 one of the latest style continually out of order. Had to replace same with old style lock #A2157.

Jan. 18/20. New lock at Alexander Hotel nickel wedged locking user in. Had to take door off to get user out.

Jan. 20/20. New lock at Union Stage user got locked in.

Jan. 26. 2 new locks at Alexander out of order nickels wedged.

Feb. 2/21. New lock at Alexander out of order nickels wedged.

Feb. 7/21. 2 new locks at Alexander out of order nickels wedged. Fixed same before leaving place—one of same locks was put out of order for second in one day.

Feb. 9/21. New lock at Alexander out of order 2 nickels wedged.

Feb. 14/21. New lock at Alexander out of order.

Feb. 15/21. New lock at Alexander changed continually out of order replaced by 3306.

Feb. 18/21. New lock #3419 inst. at P. E. L. B. robbed either Sat. or Sun.

" " " New lock at L. B. Aud out of order. Nickel would not go in control.

Mar. 1/21. Man locked in at Alexander. New lock. Had to stay in booth until I went (D L C) over and let him out.

Mar. 1/21. New lock at V. C. Sta. Installed 2/2/21. Out of order. Buffalo nickel caught in coin control.

(Endorsed): No. 1319-B. Coin Lock vs. Pacific Lock. Deft. Exhibit No. A-31. Filed 10/24, 1927. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

10/23 C3131—Ladies Dance Hall Venice two nickels passed each other & wedged. Coin latch squeezed together.

On or about Oct. 3/20 woman locked in booth, had to crawl under door at Venice comfort station.

On or about Aug. 10/20 marble broken at Rosslyn Hotel on account patron being locked in booth & had to crawl over top of booth.

10/29/20. New locks at Jack Rabbit Coaster out of order nickel pass each other wedged.

11/1/20. Union wire nickels wedged.

11/1/20. Coin latch broken into (very thin) Ladies c 3131—Venice Dance Hall.

11/30/20. Out of order Union stage (nickels wedged).

(On reverse side, blank lease Pacific Coin Lock Company.)

(Endorsed): No. 1319-B. Coin Lock vs. Pacific Lock. Deft. Exhibit No. A-31. Filed 10/24, 1927. R. S. Zimmerman, Clerk; by Francis E. Cross, Deputy Clerk.'

Mr. Newby: We ask that that be filed as an exhibit."

We do not suggest that Mr. Cosby is lying on the witness stand but it is apparent from the record that he has a very elusive memory.

The testimony of H. J. Cosby is also illuminative of the deplorable way in which the appellee performed its contract.

Mr. H. J. Cosby was in Texas sometime in March, 1920, for the purpose of attending to the locks of the appellant and also for the purpose of getting new business. He was sent to Texas in response to the following telegram [Tr. p. 566]:

"Houston Tex March 13, 1920

Pacific Coin Lock and Co.,
910 Van Nuys Bldg., Los Angeles, Calif.

Your coin locks in the Hotel in awful condition causing us to have attendant constantly on duty to take care of them stop guests complaining bitterly because of poor service stop your representative Lee in hospital due to accident however he would do the locks no good as they are completely worn out stop we cannot longer permit delay in having new locks installed and ask that you wire us what immediate action you can take to remedy situation."

Rice Hotel."

On cross-examination Mr. Cosby stated that he had no complaints while in Texas and that he had no trouble with the locks. However, he admits writing a letter dated March 23, 1920, in which he states [Tr. p. 562]:

"Houston, Texas, 3/23/1920

Pacific Coin Lock Co.,
Los Angeles, Cal.

Gentlemen:

No doubt you received my wire regarding condition of locks received from Indianapolis. I just finished writing Malsbary a nine page letter, also sent them night letter.

Eleven locks arrived today, but sent eight of them back. *The registers would not check at all.* Some in using pass key the latch would not go back far enough to pass keeper, especially if set up close. They had the register screwed on with one screw. Could very easily move same out of place. The holes for screws in back case were to small some not drilled out at all and hole so near the register unable to put screw in. Some of the locks worked free and easy while others

stiff and would bind. Some worked very hard in opening with pass key.

The parts are not standard tried to change some cases and knobs but was out of luck. One of the lugs on the inside spindle was out about so much it broke off. This was used in opening door with pass key. *The bushing for pass key was put in with one screw.* No rosettes at all. Several little defects and believe me I mentioned them in writing Malsbary. *No use putting on these new locks until they are right, but I begin to think they never will get them right* and about the only lock on the market that is right is the Pawtucket lock and its to bad we are not using it. They cut the opening where the cash door fits which made it much easier to get the nickels out, but some of the doors did not fit up tight as they should.

The locks did not get here until about noon today *and I had to go over all of them and when I got through packing, etc., the day was gone.* I certainly was hot under the collar. Came very near wiring Indianapolis office to pay my expense there and I would come in and show them the many defects and how to overcome same.

I will go over the best locks that I took off the Rice and fix the ones at the Bristol and other locations. Will make them answer until the new lock is fixed right. They seem pretty well satisfied here at the Rice so they will be O. K. for a week or so or until we are able to get other locks.

I wrote Malsbary that we must have these locks right as soon as possible as it cost a bunch of money around hotels now days and besides at rate they started out I would be all summer making this trip. Had to have the painting done here at the Rice at night. Have a man working tonight, have to pay

him double time, but at that cheaper than contract. One man wanted $60. to paint and enamel the seven doors. I am going to install two or the latest locks at the Bender tomorrow and see how they work out. Will also go over the other locations, get the painting finished and if the other locks have not arrived will go on to Dallas and finish up here on my way back. I have hustled around so much today my head's in a whirl and I wan't to go down stairs to keep the painter going as he is apt to fall asleep too the tune of $1.75 per hour.

Guess I have explained particulars and if anything special tomorrow will write you again.

With best wishes, I am

Yours truly, H. J. Cosby."

To the same effect is a letter of March 25, 1920. [Tr. p. 568]:

"Rice Hotel
Houston, Texas,
Friday Eve. 3/25/1920

Pacific Coin Lock Co.,
910 Van Nuys Bldg.,
Los Angeles, Calif.

Gentlemen:

I am enclosing letter from Crosby House of Beaumont, Texas. I was informed they inquired about our locks here at the Rice. I wrote them and their letter explains for itself. No doubt the Pawtucket people or the American Sanitary Lock Co., are working all through the South. Mr. Lee was with me all day seems to be getting along in good shape. Finished up the Bender, Brazos and Macatea. Went over all the locks and had to make a lot of changes and repairs.

Received the balance of the locks from Indianapolis yesterday but have sent them all back excepting three. Installed two additional out at the Bender and have one for sample. But will have to return them later on as the registers don't check. I was anxious to get the Bender locks on while I was having the other ones painted as could do them all at once. Mr. Lee can change them later on if necessary. He claims he has learned a lot about the locks since being with us, of course this is to be found out later on as things were in pretty bad shape and had a lot of work getting them in good shape." (Italics ours.)

[Tr. p. 331, line 19, to p. 332, line 6]:

"Want to call on the Union Station again tomorrow and a few other places. Wont be able to see Mr. Milby of the Milby Hotel until next week. *Am anxious to hear from Malsbary to see what excuse they have to offer. They had better put Bill on a pension and get a real locksmith.*

Up to the present time have not heard from Mr. Baner of Lubbock, Texas, regarding locks. I may be able to tell tomorrow whether I will stay here a few days longer or go on to Dallas and finish on my way back.

Send Mr. Lee the three seats I ordered as soon as possible. Two for Bender and one for Filbets Hotel.

Will write you a few lines again tomorrow.

Yours truly,

H. J. Cosby."

(Italics ours.)

There are still other letters by this gentleman who complains of the numerous defects in the locks and the failure of the appellee company to ship as ordered. For instance:

[Tr. p. 571]:

"Q. I call your attention to this language: 'It was necessary to go over all of them before they were OK., so many little defects that are over-looked in shipping from the factory.' What were those defects that were over-looked?"

"Q. In this letter you say, 'I would like to install new locks at this location, but am not sure how soon can get them. I ordered new locks for all these locations but it don't look as though we will be able to get them installed so long as the strike is on. Malsbury wrote me they would do their best in furnishing me locks but were unable to get enough castings. If they keep on exchanging these locks and different parts there will be quite a mixup.' What did you mean by that?"

[Tr. p. 575]:

"El Paso, Texas
5-5-1920.

Pacific Coin Lock Co.,
Los Angeles, Calif.

Gentlemen:—

I arrived here this afternoon at 4:30. Had a talk with Mr. Pinto. The locks need changing and they are being used a great deal by not depositing a nickel. All the pass keys brushings are worn on, in other words the little teeth are all cut out so you can very easily open with a knife or most anything. Up to the present time there is only one A lock here. Suppose I will have to wait for the balance. I wired the number of locks to be sent here about three weeks ago but as usual *the Indianapolis office don't seem to be able to get locks out as they should.*"

[Tr. p. 576]:

"If the locks arrive tomorrow will be able to finish here Friday, but no doubt will be hung up as usual, as they generally ship two at a time and they come day after day, never send the whole bunch at once. The weather is much cooler here. Will advise you later if lock don't arrive."

[Tr. p. 577]:

"Q. You say,—'I got this letter from Mr. Moore, the general cashier here at the Oriental, the party I arranged to look after our locks here at the hotel. Wish you would forward this letter from the American Lock Company to Indianapolis office as you can see they are getting some fine business over the country and something must be done to stir up the Indianapolis office. They try to make themselves believe they are the leading coin lock company. But I am willing to bet they are about third or fourth in the coin lock game."

And on page 577 of the transcript the witness finally admits that the locks furnished by plaintiff might have been quite defective at that time.

This witness, who, on the stand so glibly praised the conduct of the appellee in this matter and extolled the appellee's locks, finally became so disgusted with the whole situation that he writes this letter, in which he refers to the plaintiff's locks as *junk locks.*

[Tr. p. 580]:

"Houston, Texas,
3-2-1920
Sunday, 3:30 P. M.

Pacific Coin Lock Co.,
910 Van Nuys Bldg.,
Los Angeles, Calif.

Gentlemen:—

This morning I received a letter from Malsbury saying they were sending me c/o Rice Hotel some new locks via Parcel Post. Just as soon as they arrive will change the locks here at the Rice Hotel again, as I was down in the toilet room for over an hour this morning and two or three of the locks just installed would let a smooth nickel get through if the 'Rube' pushed and turned the knob the wrong way. Some of these farmers in this City grab a hold of the locks as if they were grabbing a bull by the tail or some other rough spot. Too my surprise I find the Rice have Pawtucket locks installed on the second floor. The gents have two toilets both locked and there is one or two on the ladies side. No use talking if we hold the business down stairs after our contract runs out we will certainly be luckly as I have always said this Pawtucket lock has anything beat on the market. Has our lock beat in so many ways. First its much larger and holds about twice as many nickels, they are very easy to get the nickels out. No chance of nickels falling through, a much stronger lock, one that will stand rough use. I tried one out this morning, put in a rather smooth nickel, I pushed, pulled, and turned the handle several times but still you could open the door. I also find the Hotel Cotton here has one of the Peerless locks installed. Will get the dope on it tomorrow.

I wrote Malsbury this morning telling him about the Pawtucket locks here and suggested again that Van Cleave get busy and try to buy them out. I also have a suggestion to make to you. If Van Cleave won't try to buy them out or unable to put out a lock as good *I would get busy and try to make arrangements with the Pawtucket Co., to use their locks on the Pacific Coast and Texas.* Would be better for some one to go there and talk matters over, would do this before they get much of a start here in Texas and no doubt it won't be long before they will be in California and other western states.

The new lock that the Coin Lock people are putting out is even smaller or at least don't think it holds as many nickels. The auditor mentioned about the lock being small and in busy days necessary for them to collect twice a day. You can figure yourself by having a larger lock it saves a lot of work. *Now there is no use talking its up to some one to get busy and save our business and if Van Cleave continues to sit tight I wouldn't waste any more time but would try and make some arrangements to use the Pawtucket lock. I know that I am not in this lock game for my health and I figure there isn't much of a future for me as long as we continue using junk locks.* You know I had a chance to connect with the Pawtucket people as well as the Peerless and no doubt would of been a good future but for reasons, practically no other than on account of being connected with the Coin Controlling Lock Co., for several years and besides being friends of all connected with this company, I decided to continue with their lock. *Now we are going to have a pretty rough road to travel to overcome all of competition and unless we all get busy at once we will find ourselves going backward, instead of forward.* I was wondering if Delbert placed an order for the larger sizes. We

will be apt to need a good many before I finish this trip.

You can continue writing me c/o the Rice as no doubt will be here for some time as I intend having all the locations painted and put in good shape before I leave.

Yours truly,
H. J. Cosby."

(Italics ours.)

Mr. Miller testified that there were long delays in shipments, that the appellant company could not get enough locks to supply its needs. The record is replete with letters and telegrams from the Pacific Coin Lock Co., to the appellee demanding and requesting more locks and complaining of the condition of the locks which it did receive.

The following letter is typical.

[Tr. p. 261]:

"Mr. Newby: We offer letter dated June 9, 1920, reading as follows:

'Coin Controlling Lock Company,
617 Traction Building,
Indianapolis, Indiana.

Gentlemen:

It has always been the purpose of the Pacific Coin Lock Company to treat Coin Controlling Lock Company with absolute loyalty and frankness. No effort and no money has been spared by us to promote the interest of the coin lock business in our territory. We have met with success, *which has been limited only by the great troubles we have experienced on account of the mechanically imperfect locks that you have sent us.*

Time and again we have called to your attention the fact that the locks were not being properly delivered to us and that our efforts to keep them in working order were enormously expensive. In spite of that fact the locks are continuing to deteriorate instead of getting better.

At the same time our orders have not been filled and we have lost a great amount of business on that account. There was an order put in about two months ago for San Francisco territory calling for 25 locks, which has never been filled, although we have asked again and again for the locks. This has discouraged our San Francisco man to such an extent that he has threatened to resign. We sent you a telegram of explanation in this matter on May 26th, to which we have received no reply and no locks.

In the meantime our competitors are here cutting rates and offering our customers, who have written contracts with us to make good anything they suffer in damages by virtue of breaking the contract. The Pacific Electric gave me this information confidentially and at the same time told me that the Pawtucket people had a much better lock than we had. They were inclined to take it up when our contract with them expires.

This letter is sent you merely for the purpose of saying without heat nor not in the nature of a threat that we are going to do whatever seems wisest to protect the business that we have built up. We cannot hold our present business with the locks that you are furnishing nor with those that you failed to furnish.

Very truly yours,

PACIFIC COIN LOCK CO.,
By C. E. Miller,
President."

(Italics ours.)

The Court: That may be received and filed.

(Defendant's Exhibit A-4.)

The letters on this subject were all filed as Defendant's Exhibit A-5 and A-6.

The appellee's usual course of conduct is illustrated by the following series of letters and telegrams:

On July 12th, 1920, the following telegram was sent:

"Los Angeles, Cal.
July 12th, 1920.

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Indiana.

How about that surprise mentioned your wire June twenty sixth stop If you do not intend shipping us any more locks please say so City of Seattle insists city comfort stations be equipped immediately stop *Do you realize your delays in not sending some kind of locks has cost us more money this year than we will make* stop *If you would only partially live up to your promises we might feel different but you give us the same old story from time to time* stop Are you going to keep promising or are you going to give us real service Wire answer.

Pacific Coin Lock Co.

Chge. P. C. L. Co.,
910 Van Nuys Bldg., City."

(Italics ours.)

[Tr. p. 268]:

July 20th, 1920, another telegram as follows:

"Day Letter

WESTERN UNION TELEGRAM

Los Angeles, Cal. July 20th, 1920

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Indiana.

We have just received executed contracts from City of Seattle calling for fourteen C locks Eleven A locks stop Installation must be ready for use by August first If not made by that date city has right to cancel contract stop It has required all the pull we have to get this contract and city officials do not look with favor upon it stop If we lose this contract account no locks you must assume responsibility Be governed accordingly wire answer.

PACIFIC COIN LOCK CO.

Chge. Pacific Coin Lock Co."

[Tr. p. 269]:

And on July 22nd, 1920, the following:

"WESTERN UNION TELEGRAM

Los Angeles, Cal., July 22nd, 1920.

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Indiana.

Are you going to comply with ours of twentieth wire answer.

PACIFIC COIN LOCK CO.

Collect"

[Tr. p. 270]:

On August 10th, 1920, the following:

"Day Letter

WESTERN UNION TELEGRAM

Los Angeles, Cal. Aug. 10, 1920.

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Indiana.

Refer to your telegram of July twenty ninth Advise the delay.

PACIFIC COIN LOCK CO.

Chge. P. C. L. Co.
910 Van Nuys Bldg."

On August 12th, 1920, the following [Tr. p. 270]:

"Day Letter

WESTERN UNION TELEGRAM

Los Angeles, Cal. August 12th, 1920.

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Indiana.

In answer your wire tenth we cannot satisfy our patrons any longer stop Seattle is about to kick out *You were notified in plenty of time about this contract and you were urged to take care of it* stop *your promises amount to nothing* stop *Pacific Electric are phoning nearly every day locks are out of order* stop *Do you think they will put up with this much longer* stop *Please tell us what your game is.*

PACIFIC COIN LOCK CO.

Collect." (Italics ours.)

On September 1st, 1920, the following [Tr. p. 271]:

"Night letter

WESTERN UNION TELEGRAM

Los Angeles, Cal. Sept. 1st, 1920.

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Indiana.

Believe last shipment of locks impossible to us with any degree of satisfaction. Believe they will cost more to keep up than receipts justify and because of much complaint. Hold further shipment until further advised.

PACIFIC COIN LOCK CO.
By

Chge. P. C. L. Co.,
810 Van Nuys Bldg., City."

And on September 2, 1920, the defendant in desperation sent the following letter [Tr. p. 271]:

"September 2nd, 1920.

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Indiana.

Gentlemen:—

Twelve of your locks came yesterday and after a hurried examination we sent you a night letter, copy of which is enclosed herewith. This wire was sent because we can't use the locks that you sent us and we deemed it wise not to cause you the trouble and expense of sending any more of like character. After the writer has a conference with Mr. Garrison, today we shall probably ship back all of the locks that you sent.

Our objections to the locks in part are as follows:

(1) The opening at the bottom of the lock for removing the coins affords no protection from thieves, who have taken several hundred dollars from us during the past month. To enter the latest coin box, they do not need any keys. Mr. Cosby pulled out his key ring and had two keys on it, one to his garage and one to his car, both of which opened the coin box of your latest lock. The twelve different combinations of locks confuses the thieves somewhat, but the new method of opening the latest lock will be a cinch for them. Also the removable plate is a poor fit and can be easily jammed with a cold chisel.

(2) The metal post to which the coin plate is fastened holds up the nickels when the coin box is full.

(3) The stop on the keeper will hit the knuckles of the occupant when he opens the door to come out.

(4) Practically all of the objections we had to the jamming of the nickel apply to this lock as they have to all of the other locks in the past two years.

The installation of the lock which you sent us would only increase our troubles and the objections of our customers all of whom have had about all they can bear from poor service of your locks.

The City of Seattle has been waiting installation of 16 locks since the first of July. San Francisco has been waiting the installation of some thirty locks for about a year. There are other installations of which you have been advised, which will bring the total number of locks that we need up close to 100 including those poor ones that need to be replaced with good ones. We have kept a careful list of actual damages suffered by us, which can be proved that will surprise you, all on account of your failure

to provide mechanically perfect locks as ordered.

The fact of the matter is, gentlemen, that every time you put out a new lock you put out a worse one than its predecessor. The lock that you sent us in 1915 after we had spent the necessary work and time with a file, jig saw and emory wheel, the result was the best lock that you have ever sent us. We have some of those locks at work yet and they give us practically no trouble, while all of your latest locks are chuck full of trouble. I want to tell you that you are on the wrong road and you are not going to get any where unless you change your system. Your promise of giving us bronz locks don't encourage us a bit, it is the inside of the lock that we are worried about and a method of keeping thieves from stealing the money. You ought to have a Yale lock that can't be jammed. There are a lot of little defects inside the lock that anybody who is familiar with its use could get on to in a minute. We have given you our ideas a number of times, but they don't seem to appeal to you.

Some time ago we suggested that you give us the right to manufacture these locks here on a royalty basis. I'll lay a wager that we could produce in the city of Los Angeles under our supervision a coin lock that will please our customers and help us to increase our business instead of one that makes us hustle to keep what we have already secured.

There are now and have been for over a year, representatives of the American Coin Lock Company, American Sanitary Lock Company in addition to two or three local locks that are being manufactured here and offered for sale outright. It has been very hard for us to meet this competition with the weapons supplied by you.

We had a contract with the City of Portland to use two locks in their main comfort station over six months ago and just got advice from our manager there that the city had purchased some locks, because we couldn't supply them.

There are any number of coin locks out now that are being offered for sale throughout our territory. *We can beat these fellows out on our reputation for service if we have a decent lock and a good supply of them, otherwise we will lose out.*

Please understand that we have not tried to cover all the objections to the locks, as for instance we neglected to mention the pass keys which can be purchased from any of the dealers in Los Angeles, but we have indicated to you that you are not giving very much in return for the $10.00 per year per lock that we pay you and there is trouble ahead for all of us unless you succeed in producing a mechanically perfect coin lock.

Very truly yours,

PACIFIC COIN LOCK CO.,

By

President."

(Italics ours.)

This produced some results because the plaintiff shipped 18 locks on October 16, 1920, and Mr. Miller writes as follows, on receipt of the telegram:

"Pacific Coin Lock Company,

910 Van Nuys Building,
Phone Broadway 3062
Los Angeles

October 19, 1920

Coin Controlling Lock Co.,
617 Traction Bldg.,
Indianapolis, Ind.
Gentlemen:

We beg to acknowledge receipt of your telegram dated Oct. 16th, as follows:

'Shipped parcel post eighteen locks today two more Sunday.

Coin Controlling Lock Co.'

We will be very glad to get these locks and will use them, if they are in good working order. As you know, we are in very serious condition on account of your failure to supply us with locks, and on account of the imperfect working of those locks that you have supplied. We hope these locks will help us out somewhat.

At the same time, we want it distinctly understood that we do not forget and forgive all of your past failures because we accept these twenty locks. We have been long suffering and very patient with you, and we are still hopeful that things will come out all right, but at the same time, we must always keep ourselves in position to protect our own business.

Very truly yours,

PACIFIC COIN LOCK COMPANY."

(Italics ours.) [Tr. p. 274.]

The record shows that the defendant sent letter after letter and telegram after telegram to the plaintiff company requesting shipments pointing out defects and telling the plaintiff that it was losing locations and business because of plaintiff's lack of cooperation and failure to properly fill the orders as needed.

Mr. Van Cleave, as president, did not even see fit to accord the defendant the courtesy of answering its frantic appeals for locks.

Mr. Miller also testified [Tr. p. 261] that while the sample locks were well prepared and properly machined the locks sent for use would be unpolished, not machined and rough finished.

On page 330 of the transcript Mr. Miller is asked to state the difficulties experienced by the defendant company in operating the locks shipped to it by the plaintiff. This testimony is quite voluminous and we refer the court's attention to it but call attention to this particular portion found at page 336 of the transcript:

> "Q. By Mr. Newby: Did you lose any locations in Texas? If so, when, where and why? A. We lost the Rice Hotel. When their contract expired they ordered the locks taken off, or they would take them off themselves, because they claimed the locks were continually out of order and would not work properly. We lost the Gunter Hotel in Texas for the same reason We lost the city comfort stations in the city of Dallas for the same reason. We lost the Metropolitan Hotel in Ft. Worth, I think it was, for the same reason. That is all I can recall by reason of improperly working locks. We lost a lot of them because we didn't have locks to put on."

And page 337 of the transcript is as follows:

"Q. By Mr. Newby: Now, Mr. Miller, you stated that certain locations were secured in the city of Seattle. Were there any locations secured from the city? You mentioned an ordinance was passed. A. I recall that very well, because I secured that myself. The contract with the city of Seattle was an ordinance passed by the City Council and signed on the 14th day of July, 1920. We were unable to secure locks, although we made repeated requests by wires and letters, and every week or two for a year, and were finally advised by our attorneys in Seattle that the city had put on some locks that they had secured elsewhere. But we again, through our attorneys in Seattle, were enabled to get the contract renewed, and finally we got the locks and put them on the 7th day of July, 1921, more than a year after we had requested them.

Q. I will ask you to state to the court whether or not in your opinion you could have secured additional locations prior to the termination of this contract if you could have secured locks to put on the locations? A. Yes, indeed; there were several very attractive avenues for new business which I purposely refrained from trying to get, because we had neither a supply of locks nor locks that would work.

Q. Can you tell the court any particular locations or case that came in that category you have just mentioned, that you had it arranged, but could not get locks of the kind or quality desired? A. Southern Pacific Railroad."

[Tr. pp. 338-339]:

"Q. By Mr. Newby: Do you recall any other locations? A. At a considerably earlier period,

mentioned in these letters there, I had an agreement with the city of Los Angeles to lock the public comfort stations of the city of Los Angeles. I had an agreement with the park commission, under whose jurisdiction and management the public comfort stations at Los Angeles comes—I met with them and they agreed to allow us to lock certain toilets in the city of Los Angeles; and we were allowed to try out two of the locks in Westlake Park, and they worked so badly that the city told me, the park commission told me, they could not tolerate a lock of that character, and if I should come at a later date with a better lock they would talk to me again about locking some of the toilets, but not with that lock."

On April 23, 1923, the appellant sent the following telegram to the appellee [Tr. p. 340]:

"Los Angeles, Calif. Apr. 23, 1923.

C. N. Van Cleave
617 Traction Bldg.,
Indianapolis, Ind.

Your letter seventeenth Stop I have purchased Garrison interest in Coin Lock Company and sold one third interest to Lee Hervey suggest you postpone trip here about one month until after our attorney visits Indianapolis Stop My program will compel me to be away most of the month anyway Stop Under any circumstances however will be glad to see you personally and help you have a good time in California.

CLINTON E. MILLER,
1233P"

In explaining the reason for sending this telegram Mr. Miller testified [Tr. p. 340]:

> "I don't know just what you have in mind, but I will state we had arrived about the first of the year 1923 to the conclusion that we couldn't hope for a good lock from the Coin Controlling Lock Company, nor for a supply of locks, as needed. We had sent a series of telegrams and letters, to many of which we received no answer, in the latter part of 1922. I think in the latter part of 1922 I sent a telegram in which I told them we had accumulated orders for locks, in which I told them we were in need, as I recall, of 200 or more properly working locks; that we had lost business in all parts of our territory because we had received no locks at all, and those we did receive were very poor and would not work properly; and I insisted upon Mr. Van Cleave coming to California, and offered to pay half his expenses if he would come out to California and discuss the situation; that I would come back there except for pressing matters I could not leave. He stated he was coming, but didn't come. His locks didn't come, and we were without properly working locks and were away behind in our orders. In fact, there never was a time after 1919 that we ever were in any other condition than from 10 to 200 locks in arrears for locations on which we had contracts. So on the first day of January—
>
> Mr. Shoonover: May we have that identified as to what exhibit it was? The telegram he is talking about.
>
> Q. By Mr. Newby: Can you state when that telegram was sent? A. It is in that exhibit A-5.
>
> Q. Go ahead. A. The letters and telegrams there will all speak for themselves as to those matters. I can't recall the contents and dates of all of

them; but I know the situation approached that where I began to try to find a place where I could get a lock that would work properly and a supply of locks. I wired the General Service Company at Baltimore, whose lock I considered to be one of the best in the United States, and offered to pay Mr. Hervey's expenses, who was president and controlling owner of the company,—offered to pay his expenses if he would come to Los Angeles and discuss the matter of obtaining locks for our locations. Before that time, Mr. Garrison and I had decided that the lock situation had arrived where there was not enough for both of us to give so much time to it; and I made a give and take proposition and Mr. Garrison decided to sell his interest to me, which I purchased. And upon Mr. Hervey's arrival here, we negotiated, and I made an arrangement with him to supply us with locks,—made a tentative contract with him to supply us with properly working locks. I thereupon sent a telegram. I had received a few sample locks, about the 25th sample I had received.

Q. That is from the plaintiff? A. Yes, and upon receipt of that notice that they were going to send us some locks, I wired them not to send locks, that I had made arrangements for other locks and sold a one-third interest to Mr. Hervey."

On this record the court finds that the appellant condoned and encouraged the breaches of the appellee.

At the trial the appellee contended that the acceptance of the locks and their use by the appellant constituted a waiver of the defects.

The rule contended for is not only an inaccurate statement of the law, but is not applicable to the facts of the instant case.

The proposition is well stated in 6 Ruling Case Law, 992:

> "Not infrequently it happens that the subject-matter of the contract is used or retained by the promisee because, under the exigencies of the case, he has no alternative. Notwithstanding the fact that he knows that the subject-matter is not such as has been contracted for, the use of retention thereof under the pressure of necessity, though it requires him to make compensation to the extent of the benefit actually received, is not such an acceptance as amounts to a waiver of the damages sustained because of the imperfect performance."

If the appellant had returned the defective locks as fast as received it would never have been able to install a single lock as the record shows that none of the locks ever received by it were in shape to be installed or worked satisfactorily after installation except for short periods of time. And then only under constant care and attention.

But there is still another factor to be considered. The appellee kept promising to make the locks good and led the appellant to continue their use in the hope and expectation of at last receiving a good workable lock.

On July 30th, 1919, Mr. Van Cleave sent the following telegram:

[Tr. p. 224]:

> "Mr. Newby: We offer original telegram from Mr. Van Cleave to Mr. Miller, dated July 30, 1919, and reads as follows:
>
> 'Hearty congratulations old man I am for you Will send locks as fast as possible You have the right system of the comfort station business You have

the personal pull to beat any competitor on the coast We will do our part Writing you fully'

"Q. By Mr. Newby: Do you know anything about the circumstances of this telegram? A. That telegram, as I recall the matter, was in response to our information to them that we had secured certain valuable contracts and were negotiating for the contracts for all the city comfort stations in the city of Los Angeles."

On January 14, 1920, Mr. Van Cleave writes to the defendant as follows:

[Tr. p. 243]:

DEFENDANT'S EXHIBIT T.

"Home of the Coin Lock
Coin Controlling Lock Co.
Traction Building, Indianapolis, Inc., U. S. A.
Chicago Detroit Milwaukee San Francisco Los Angeles Atlanta New York Boston Portland Seattle Syracuse Sioux City

January 14, 1920

"The Pacific Coin Lock Co.,
#910 Van Nuys Building,
Los Angeles, California.

Attention Mr. C. E. Miller
Mr. C. C. Garrison

"My Dear Fellows:—

"I am going to start a surprise on the road to you about the day after tomorrow in the form of a new lock and 'believe me it is going to be some lock this time, and take it from me' within thirty days from now and I believe it will be less time than that we are going to be able to give you locks to your heart's content. I know that this will be a pleasant surprise and God knows a great relief to us.

"If we haven't got a lock now that is absolutely foolproof which will work as perfectly as the hour

hand on your clock, I am going to quit trying to think one up, so make your plans to get ready to take care of the business. I am going to endeavor to get one on the road to you by the day after tomorrow. Then I want you to pick it to pieces; tell me all the faults you can find because it is out of these criticisms or suggestions on the part of gentlemen like yourselves who have the actual experience that helps us to overcome the defects. I have never seen one yet up to the present time but that has plenty of them when it comes to being knocked around by the public, but I tell you I believe we have it.

"Trusting that everything is going well with both of you, and with many good wishes for the New Year, I am,

Very truly yours,

CNV/MEW C. M. VAN CLEAVE."

And then again on March 3, 1920, Mr. Van Cleave in reply writes:

[Tr. p. 249]:

DEFENDANT'S EXHIBIT W.

"Home of the Coin Lock
Coin Controlling Lock Co.
Traction Building, Indianapolis, Ind., U. S. A.

Chicago Detroit Milwaukee San Francisco Los Angeles Atlanta New York Boston Portland Seattle Syracuse Sioux City

"March 3, 1920.

"Mr. C. E. Miller,
Pacific Coin Lock Co.,
#910 Van Nuys Bldg.,
Los Angeles, Calif.

Dear Mr. Miller:—

"We are in receipt of yours of the 24th and have noted carefully its contents. I want to thank you for

the check of $750.00 which has been placed to your credit.

"My Dear Sir, at this point I want to take up with you the paragraph of your letter in which you ask us to give you a credit for business that you are supposed to have lost. I think you will have to admit that we have always shown the spirit of meeting you half way on almost anything and have already made a number of concessions and you will always find us ready to deal with you in the same manner on future questions that may come up, but this is one that we cannot see our way clear to grant. If you gentlemen think for a minute we have not had our troubles at this end of the line endeavoring to get locks to you, you have another guess coming. We have both had our pleasant and unpleasant experiences which are only characteristic of any line of business and particularly so at this time and under conditions that have existed for the last four years.

"The most fortunate thing that has recently happened in connection with this business is the discovery of the new method of making the lock. It is going to be very simple and easily constructed, thereby enabling us to turn out three to the one turned out before, and we are calling in outside help.

"We realize the importance of getting a stock of locks ahead. 'Take it from me' we are going to get them to you at an early date and plenty of them and with your representative the Independent Lock Company, it is going to be your own fault if you don't put your competitors out of business. In this connection we have employed the best firm of patent lawyers in Indianapolis and they are now getting ready and we hope to within the very near future file suits against our various competitors, for as I have told you before, we are going to control this business

for we feel confident that our patents will protect us and we are going to defend them, but patent litigation is a very expensive undertaking, naturally we wanted to shirk it as long as it is policy to do so but we have now reached the point where we are going to take action.

"If you possibly can we would like very much indeed to have you secure one of the locks of your new competitor and get it to us at the earliest date possible.

"With reference to Utah, we will give you permission to install our locks in Ogden and Salt Lake City but don't construe this to be exclusive for all time to come. We want to be absolutely fair and generous with you but we don't want any misunderstanding or unpleasant arguments like that which came up over Texas.

"I will write you again the last of this week or the first of next week sure and give you something more definite as to the date of generous shipments.

Yours very truly,

Coin Controlling Lock Co.,

By C. N. Van Cleave.'"

A reading of the transcript shows that the appellee was constantly promising better locks and quicker shipments, but invariably failed to conform to the promises. The appellee would ship excellent sample locks properly machined and constructed of hard metal. However when the actual locks arrived them were not machined, made of soft metal and rough casting.

[Tr. p. 441]:

> "Q. I will ask you if it is not a fact that you did not from time to time order locks and specify the newer equipment repeatedly? A. Yes, we would order equipment according to the finished model that was sent.
>
> Q. Didn't you repeatedly specify new equipment, and say they were working better? A. No, it was because the old equipment was working so bad we wanted to try the new ones, and we had models sent us that worked perfectly, because it was machined and hard metal, and when we would get the locks they wouldn't work at all, they were cast and rough and coarse, and impossible."

Where the record shows a state of facts as existed in this case the rules of law applicable are clearly defined. The appellee has attempted to show a waiver of the defects and the breach of warranty because the appellant used the locks. But it has been repeatedly held in California and elsewhere that where such use and retention is under the force of necessity or that the use was encouraged by the vendor for the purpose and under the promise of correcting the same there *is no waiver.*

The authorities cited *supra* and the following authorities support this view:

> Ventura Mfg. Co. v. Warfield, 37 Cal. App. 147;
> Luitweiler etc. Co. v. Ukiah etc. Co., 16 Cal. App. 198.

A somewhat similar rule though broader in scope is stated by the court in Wallace v. Clark & Co. (21 A. L. R. 361, 364), where it is said:

(p. 364) "The authorities are not in accord on the question whether an implied warranty survives acceptance, with knowledge by the purchaser of a breach of the warranty. Aside from New York, the rule generally obtains in most states that an implied warranty, like an express warranty, survives acceptance, even as to known defects, to the extent that the breach may be relied upon as furnishing a basis to recoup or counterclaim damages in an action for the purchase price, or as the basis for an independent action for damages. Firth v. Hollan, 133 Ala. 583."

Benjamin v. Hillard;
Memphis v. Brown, Fed. Cas. Mo. 9,415;
23 How. 518;
16 L. ed. 518.

And in 35 Cyc. 433, the rule is laid down and amply supported by authorities that where the retention and use has been induced by the request or promise of the seller there is no waiver of the warranty.

See also:

35 Cyc. 430.

The complement of the rule is stated in 22 Cal. Juris. 1006, where it is said:

(p. 1006) "In the case of a sale of machinery which requires adjustments, the seller is entitled to a reasonable time in which to demonstrate that the thing can be made to function; and if he has remedied all all defects which the buyer called to his attention, there is no basis for a claim of breach of warranty; but if his efforts, following upon the time of delivery, proved to be unsuccessful, the buyer is entitled to repudiate the transaction; and the circumstance that, at

a subsequent time, the machine was operated by the seller, does not affect the buyer's right of rescission."

Jackson v. Porter Land & Water Co., 151 Cal. 32; 90 Pac. 122;

Boothe v. Squaw Springs Water Co., 142 Cal. 573; 76 Pac. 385;

Ventura Mfg. Etc. Co. v. Warfield, 37 Cal. App. 147; 174 Pac. 382;

Williams v. Bullock Tractor Co., 186 Cal. 32; 198 Pac. 780.

So, where the buyers use the article the retention of it beyond the stipulated time is not a waiver of the breach of warranty when it was for the purpose of giving the seller an opportunity to remedy the defects called to his attention.

Lichtenthaler v. Samson Iron Wks., 32 Cal. App. 220;

30 American & Eng. Ency. of Law, 188;

Fox v. Harvester, etc. Works, 83 Cal. 333.

The general rule in all jurisdictions is that an express warranty survives acceptance and that damages for a breach of an express warranty will lie though the purchaser has received and used the goods. And especially is this true where the use and retention is under the force of necessity or induced by the promises of the seller or his attempts to make the article conform to the warranty. In the latter class of cases the courts have held that the buyer can even rescind the contract though there has been an acceptance.

The only controversy in our system of jurisprudence on this matter is over the question of whether or not the

right of rescission will survive acceptance, use and retention. All agree that the right to damages does survive.

With these broad general principles in mind we can proceed to examine a special rule applicable to the class of cases in which the instant case falls.

Where we have a contract such as the contract in this case where there is to be successive deliveries of patented articles of machinery to conform to a warranty, and such deliveries are neither on time nor in conformity with the warranty and the installments are all inferior, with the exception of a few samples, the buyer or lessee, in addition to his right to sue for the breach of warranty, has the right to terminate the contract, refuse to pay for or accept future installments, and would, under such circumstances, become liable only for the value of the goods retained, and the benefits derived by him in their use.

This proposition is well demonstrated in the case of Bobrick Chem. Co. v. Prest-O-Lite Co., 160 Cal. 209, 215, where the court said:

> "If it is made apparent that the articles to be furnished by the vendor cannot come up to this standard, by reason of some defect in the plan or device according to which they are to be made, which we must assume to be the case here in view of the finding referred to, no reason is apparent why the vendee may not refuse in advance to go on with the contract, instead of waiting until plaintiff has manufactured and offered for delivery the sets still to be furnished, and then refusing to accept the same. The latter course would hardly be consonant with fair dealing where it is apparent that goods to be manufactured by the vendor at great expense would be unsatisfactory to an extent warranting and in fact compelling their rejection when offered."

For as has been stated (38 L. R. A. (N. S.) 544):

> "Acceptance of one or more installments of goods or articles purchased under a contract, to be delivered in instalments, is not acceptance of the whole, and hence the fact that the purchaser under such a contract accepts one or more instalments of goods or articles which are defective in quality does not in general impose on him the duty of accepting future instalments if they are likewise defective, and in this respect not in accordance with the requirements of the contract.
>
> And acceptance of one instalment not according to the contract of sale is not a waiver of the right by the purchaser thereafter to insist that other instalments shall meet the requirements of the contract."

Under no interpretation of the contract can it be said that the appellee performed its agreement nor can any rule of law be adduced to show a waiver of the appellant's right to terminate the contract for breach of warranty and sue for the damages sustained by it by virtue of the appellant's failure to perform.

IV.

In the Light of the Authorities Cited Supra and Portions of the Record Set Out Above, the Appellant Was Clearly Justified in Declaring the Contract Canceled on April 23, 1923, and Was Entitled to Recover on Its Counterclaim.

At the trial of this action the appellee argued the point that the express warranty contained in paragraph (4) of the contract excluded all implied warranties and that said warranty was conditional in that it was not to be effective unless the locks were returned to plaintiff's main office.

In other words, the plaintiff overlooks and disregards the first sentence of the warranty, "The company guarantees its locks as to material and workmanship," and goes on to assume and argue that all paragraph (4) amounts to is a guarantee to repair or replace defective locks if returned to the main office of the plaintiff.

The absurdity of this contention is demonstrated as follows, read as the appellee would have it the guarantee would read: "The company guarantees its locks as to material and workmanship, provided the locks are returned to its main office."

Paragraph (4) really contains two guarantees—one for material and workmanship and one a covenant to repair or replace defective locks.

Unless the locks were good under the first guarantee of material and workmanship the latter repair warranty is surplusage. The appellant contracted for workable locks, not free repair service, for it could get no profit out of locks being constantly repaired at the main office. As shown by the evidenuce the locks supplied by appellee would have been constantly in transit, if this was the extent of appellant's obligation.

One of the main reasons why the appellant terminated the contract was because the appellee failed to send it locks as needed. The testimony of Mr. Miller was to the effect that they did not receive hardly any locks in 1922 and that the locks received were unworkable.

It would be an empty sort of warranty which would require the few locks received to be returned, especially when the returning only resulted in replacements which were just as bad as the locks returned.

As stated above, paragraph (4) of the contract contains two covenants: (1) A covenant to repair if the locks were returned to the home office, and (2) a warranty of material and workmanship.

The warranty was breached as soon as a defective lock was shipped by the plaintiff.

As demonstrated in the forepart of this brief the law on this subject is well settled. Where there is a breach of warranty as to quality and workmanship on a machine, retention and use of the appliance by the vendee does not waive the warranty, and furthermore the vendee can recover for the money he spent in trying to make the article conform to the warranty.

The appellee at the trial also attempted to advance the proposition that, having used and retained the locks, the defects were waived. But even under this theory the appellee fails because the defects might have been waived as to locks already in use over an extended period, but all new locks would be subject to a strict construction of the warranty. In other words, if the last batch of locks received did not conform to the warranty they could be returned and the contract cancelled by the defendant.

The court, in its findings of fact, found that the appellee breached its contract from time to time as to warranty of material and workmanship, but that the appellant failed to take advantage of these situations as they arose from time to time. Under the cases cited *supra* it is apparent the court erred in its conclusion that the appellant failed to take advantage of these breaches.

The appellant was justified in the course it took in the face of the appellee's inexcusable conduct. There was no

waiver of the appellant's rights to cancel the contract for breaches on the part of the appellee and upon such cancellation appellant was entitled to recover the damages which it suffered because of appellee's wrongful act.

To properly present this branch of the case it is necessary to ask the court's indulgence if we introduce and discuss certain portions of the testimony. However, before discussing the evidence it might be well to first lay down the rules of law applicable to this portion of appellant's argument.

In Fox v. Harvester Co., 83 Cal. 333, it was held that:

> "For breach of warranty of a machine sold by the manufacturer, and returned after trial as being unfit for use, the measure of damages is the price paid by the purchaser, with interest, and in addition thereto, such amount of expense or loss as he has actually sustained in *bona fide* attempts to make the machine do the work for which it was constructed, including compensation for the loss of time, horse-hire, use of animals, and wages and board of hired men."

In accordance with the fundamental rule that, where goods sold with warranty and fail to conform to the same, the buyer is entitled to recover as direct damages expenses incidental to the use of the merchandise, the buyer may also recover the amounts he expended to make the chattel conform to the warranty.

For instance, in the case of Silberhorn Co. v. Wheaton *et al.*, 5 Cal. Unrep. 886, the buyer was held to be entitled to recover the cost of curing hams which had been insufficiently treated.

And in McLennan v. Ohmen, 75 Cal. 558, it was held that where an engine was sold under a warranty and failed to conform to the same the buyer could recover the cost of installation, the difference between the actual value and the value, if it had conformed to the warranty, plus the loss incurred by an effort in good faith to use it for such purpose. This item included the extra coal which he had to use.

Erie City Iron Works v. Tatiem, 1 Cal. App. 286, was a case where the defendant had the exclusive agency on the coast for the sale of the plaintiff's steam engines. Plaintiff sold the engines to the defendant on a warranty of its fitness for use in running machinery.

In 1888 defendant received an engine and resold it with the same warranty. In 1888 the engine was installed and used by the subvendee. In December, 1889, the engine deevloped defects and the plaintiff supplied a new governor for the motor. This did not remedy the defects and the subvendee spent $219 trying to make the machine function. In 1891 the defendant sued the subvendee for the purchase price, which was three years after the subvendee had received and used the engine.

The suit was compromised and settled by the defendant allowing the subvendee the $219 on the purchase price. Shortly after this compromise the defendant sent the plaintiff a bill for $319, being the $219 paid out for remedying the defects and $100 attorney's fees in the suit between the defendant and subvendee.

The court held that (syllabus):

> "Where an engine was sold upon warranty of its fitness for use in running machinery, the measure of

damages for a breach thereof is the excess of value which it would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time, together with a fair compensation for the loss incurred by an effort in good faith to use it.

Defects in the engine which constituted the breach of warranty were not waived by retention of the engine. The purchasers had the option either to return the engine and rescind the contract, or retain it and sue for damages for the breach or may counterclaim the damages in an action for the purchase money.

A credit given for repairs by inserting a new governor in the engine, which it was supposed would remedy the defects, but which failed to do so, does not constitute a waiver of future damages, or of expense incurred in the continued use of the engine, for which the original vendor is liable. Such credit was in effect a payment which the vendor was bound to make.

The delay in presenting the claim for damages for breach of warranty, in addition to the credit for repairs, cannot constitute an estoppel to claim further damages for breach in view of the relations of the parties and that the purchasers had the exclusive right to handle on this coast articles manufactured by the vendor, and were charged with the duty to advance its sales and trade on this coast."

It will be noted that in this case the engine was retained and used for over three years before any claim was made for damages resulting from the breach. We also wish to call the court's attention to the rule stated that:

"The delay in presenting the claim for damages for breach of warranty, in addition to the credit for re-

pairs, cannot constitute an estoppel to claim further damages for breach in view of the relations of the parties and that the purchasers had the exclusive right to handle on this coast articles manufactured by the vendor, and were charged with the duty to advance its sales and trade on this coast."

To the same effect is

Western Steel etc. Co. v. Feykert, 69 Cal. App. 763, and

Cohn v. Bessemer G. E. Co., 44 Cal. App. 85.

Applying these principles to the case at bar clearly demonstrates that the appellant had a right to recover for all of the loss incurred in attempting to make the locks conform to the warranty and for all of the expenses to which it was put to keep the same in operation. The appellee was in the business of manufacturing coin locks and Mr. Van Cleave was supposed to be a coin lock expert. As such he must have known that if he sent the defendant locks which were rough cast, not machined, poorly constructed, and made of improper materials, that the appellant would have to do a great deal of work on them to make them operate. The very fact that the samples sent the defendant were made of hard metal, well machined, polished and made of proper materials shows that he knew what the lock ought to be if properly constructed of proper materials.

Mr. Van Cleave not only should have known, but he actually knew what troubles the appellant was having in using the locks and all of the defects were called to his attention, but to no avail. The appellant sent in an order for locks in January, 1923, which was unanswered and

unfilled until after April 23, 1923, when the appellant finally terminated the contract because of the appellee's failure to perform it.

The record shows that it was necessary to work over every lock before it could be installed and that a corps of mechanics and trouble-shooters were necessary to keep the locks in operation after installation.

Testimony of Clinton E. Miller [Tr. p. 332]:

> "It was very necessary for us to have a man whose principal duty was to look over the locks, work over the lock, and put it in proper working order, before we attempted to put it on a location. We had to have an extra man in Los Angeles on full time. We had to have a man at each of the beaches who would have to be there on trouble calls, because people would get locked in with the locks, and the doors would sometimes be broken open and broken down; and we had to employ a matron at our comfort station in Venice, to be there in constant attendance in order to report the calls to our men that we employed at Venice, to come and repair the locks and fix it, so it would work properly. We had the same situation in San Francisco and Seattle, that required us to employ one man and sometimes two men in each of those places in order to take care of the locks, due principally to the poor material and workmanship of the locks."

Mr. Miller testified that he had one of the locks installed as they came from the appellee without any working over. The result was that the lock was out of order the same day it was installed. [Tr. p. 453]:

> "A. I think Mr. Van Cleave called my attention to it, and I told the men, hereafter I want them installed exactly as they sent them, because he said all

our trouble out here was that we were trying to fix these locks and making them worse instead of better. And I called all the men in and demanded that they put them on exactly as they sent them. They all said I was wrong, and it was proved I was wrong.

(Witness continuing): I wrote Mr. Van Cleave we were going to do that. I wrote him that I had been trusting to others to look after the mechanical end of the business. I said, 'And your letter convinces me it hasn't been done as it should be.' I meant that at the time—in 1922.

Q. And you told him you were greatly surprised to learn they were using those keepers, didn't you? A. Yes, and I made them install them exactly as they came then, and they were all out of order and in trouble the next day."

The record also shows that if the locks had been as warranted they would have given a minimum of trouble and would have permitted of collection by the various sublessees without the necessity of the appellant sending men to Texas, Seattle and San Francisco to trouble-shoot and collect.

Testimony of Clinton E. Miller [Tr. p. 342]:

"I wired the General Service Company at Baltimore, whose lock I considered to be one of the best in the United States, and offered to pay Mr. Hervey's expenses, who was president and controlling owner of the company—offered to pay his expenses if he would come to Los Angeles and discuss the matter of obtaining locks for our locations. Before that time, Mr. Garrison and I had decided that the lock situation had arrived where there was not enough for both of us to give so much time to it; and I made a give and take

proposition and Mr. Garrison decided to sell his interest to me, which I purchased. And upon Mr. Hervey's arrival here, we negotiated, and I made an arrangement with him to supply us with locks—made a tentative contract with him to supply us with properly working locks. I thereupon sent a telegram. I had received a few sample locks, about the 25th sample I had received.

Q. That is from the plaintiff? A. Yes, and upon receipt of that notice that they were going to send us some locks, I wired them not to send locks, that I had made arrangements for other locks and sold a one-third interest to Mr. Hervey.

(Witness continuing): Since the date of that telegram we haven't ordered any locks from the plaintiff. We received the first locks from the General Service Company, Mr. Hervey's company, in April, 1923, about the time we broke off from the Coin Controlling Lock Company. They were installed very promptly.

Q. By Mr. Newby: Now, if you will, tell us what experience you had with these locks that were immediately installed that you got from the new company? A. Well, the locks were in the first place refined and polished and worked perfectly. As to material and workmanship, there was no criticism. We have never had an order into the factory that has not been filled within two weeks after we ordered it.

Q. By Mr. Newby: At that time did you have difficulty with the lock? How did your experience compare as to its working or jamming or failing to work, with the locks of the plaintiff? A. So far as I have been able to observe, from the moment we put on the new locks there has never been a lock jammed, never been a person locked in and never been a miss in the operation of the locks. We can let the locks go

for months without anybody looking at them, and it works perfectly—the new lock.

(Witness continuing): And did then. The operation of this new lock from the Hervey company at that time, in 1923, was perfectly satisfactory to the defendant. We now have the same locks at the same locations. There has been no change made. They are still operating satisfactorily."

The record also shows the amount of damages sustained by the appellant because of the defects in the appellee's locks.

Mr. Crews testified that he was an accountant and worked for the appellant from April 1, 1922, until September 1, 1924; that Exhibits A-11 and A-12 [Tr. pp. 498 and 501] were prepared by him and show the amount of money taken in by certain locations together with the amounts spent by the appellant to keep them in operation.

The exhibits are here referred to with the testimony explaining the same:

"Q. By Mr. Newby: Now, will you explain, Mr. Crews, just what these sheets do show, so that the court may see how you made them out and what items were included? A. Included in this statement are items of men in outside territory. At Houston, Texas, for instance, that was a town of a considerable amount of business, we were compelled to keep a man there just for the purpose of trouble shooting and also to work over the locks that were installed on the doors. I have put down the monthly payment to that particular man each month in that period. We had locks also in Dallas and other similar places—

Q. Without going through all of them, in other territories, you did the same? A. Did the same.

(Witness continuing): I have not included in that the general overhead and managerial expense nor the ordinary expense for collecting. I put into those accounts solely the amount that we had to pay for this trouble shooting and working over these locks outside of Los Angeles. I have not included any of the expenses in the city of Los Angeles.

Q. Why did you leave that out? A. That might be considered, probably correctly, that it would be a nominal expense of the lock company.

Q. In other words, in Los Angeles, they would have to have an office anyhow where they have the general management of the whole business? A. The men in Los Angeles did a great deal of that; they would not send locks to locations until we thought they would fit when placed against the door. We always found there was some additional work to be done. Most of the lock companies,—well the only one I have any knowledge of is the General Service, they will give locks to a hotel at a distant location and leave it to the hotel to apply. We have to keep men to do that installing and also attend to trouble afterwards, and those men are expensive. Salaries is the only thing included in this statement.

Q. What does that aggregate show? A. $11,-027.50."

Testimony of J. H. Crews [Tr. p. 516]:

"Q. By Mr. Jones: Now, this exhibit here with respect to these earnings you just estimated that? A. No. sir.

Q. Did you figure out how much was expended? A. I took the actual book's figures and averaged them for the twelve months.

Q. And you charged for trouble and repairs all of the salary of those men at Dallas and Houston, and these other men there, did you? A. I was referring to the first statement, that was averaged. The second statement is taken from the books themselves.

Q. And that was charged, all the salaries, to repairs and trouble shooting? A. They were all not charged to that, no.

Q. How much of it? A. On that statement is, those particular men, all the money paid to them, including their expenses and remuneration, was charged to this item.

(Witness continuing): It is not customary for these companies to keep a representative in each locality for the purpose of representing the company there and to see that these locks are in repair. The expense I have had with the companies has been the opposite. They don't all send men to install the locks. There are locks in three locations that I have seen on the Pacific Coast from lock companies in Indianapolis, and the locks were sent to the hotel and they did the installation and collection and repairing and sent back the lock companies' proportion to them, without anyone ever visiting the hotel."

Mr. Crews in explaining the items in Exhibit A-11 testified as follows:

"Q. By Mr. Newby: Mr. Crews, with reference to the Hayward Hotel, you state here that the yearly receipts were $411.50, and the Alexandria Hotel $1,-208.12, they were the actual receipts for the year pre-

ceding the removal? A. That was the average yearly production for the time they were installed.

(Witness continuing): The same is true of the others. That is the portion the Pacific Coin Lock Company received. The percentage that went to the location is not included."

The sum of $23,875.45 appearing at the foot of the exhibit represents the profits which the defendant would have made if the locks had conformed to the plaintiff's warranties of workmanship and material.

The general rule of contracts is that there must be full performance on the part of the plaintiff before he can demand the sums due under the contract unless the defendant has prevented performance or wrongfully repudiated or terminated the contract.

The question of whether or not the appellant waived strict performance and the warranty has already been discussed *supra* and will not be discussed in this branch of the case. We assume that we have clearly demonstrated that there was no waiver of the warranties as to material and workmanship nor of the appellee's obligation to deliver locks when needed, and that the court erred in finding that the appellant waived the breaches.

With this in mind we call the court's attention to the following statement of the rules of law governing performance generally [6 R. C. L., p. 966, Sec. 342]:

"By the common law, a party to a contract was compelled to show a literal performance of the stipulations of it before he could claim damages for a non-performance against the other. Expressions in some of the more recent cases seem to indicate a

tendency to relax the rigor of this rule. Thus, it is said that the law looks to the spirit of a contract and not the letter of it, and that the question therefore is not whether a party has literally complied with it, but whether he has substantially done so. Other courts have said that substantial, and not exact performance, accompanied by good faith, is all that law requires in the case of any contract to entitle a party to recover on it. Although a plaintiff is not absolutely free from fault or omission in every particular, the court will not turn him away if he has in good faith made substantial performance, but will enforce his rights on the one hand, and preserve the rights of the defendant on the other, by permitting a recoupment. Such statements would appear to be especially applicable to cases in which, in view of the nature of the contract, a substantial compliance must have been contemplated by the parties. For instance, under a contract to build a carriage just like a model, the plaintiff is doubtless bound to show that the carriage tendered is as good in every respect as the model; that in style, size, general appearance, etc., it is like it. Or to state the proposition in the usual form, the plaintiff cannot recover unless he shows a full and substantial compliance with the contract on his part. But to say that the parties intended that the two carriages should be precisely alike in every unimportant particular, that there should not be the least difference between them in any part, however slight, would be placing upon the language used a forced and unreasonable construction. It is impossible for any mechanic to make, even two spokes precisely alike, so that a glass, or possibly the naked eye, cannot detect some slight difference between them. In some cases the rule has been laid down that where a thing is so far perfected as to answer the intended

purpose, and it is taken possession of and turned to that purpose by the party for whom it was constructed, no mere imperfection or omission which does not virtually affect its usefulness can be interposed to prevent a recovery, subject to a deduction for damages consequent upon the imperfection complained of, but that the indulgence is not to be so relaxed as to cover fraud, gross negligence, or obstinate and willful refusal to fulfill the whole engagement, or even a voluntary and causeless abandonment of it. Again, as the ordinary common law rule was in many instances found to operate harshly, equity courts have not always adhered to it. A punctilious performance of the *minutiae* of a contract is not always required in equity, though the want of it may present a difficulty in a court of law. If the conditions have been substantially performed, and the benefit of the contract fully secured to the opposite party, equity has considered it sufficient."

Whether or not there has been a substantial performance of an agreement depends upon the peculiar circumstances surroundings each particular case, subject, however, to the broad general principles outlined above.

For instance it has been held that there was substantial performance where the deviation or omission were so slight that they might have been made by one honestly endeavoring to comply with his contract. Perry v. Quachenbush, 105 Cal. 299.

In the case at bar the appellee furnished excellent sample model locks, but impossible locks for general use. This demonstrates that it could have furnished good locks if it had so desired. Was this evidence of good faith or an honest endeavor to comply with the contract?

Such a conclusion manifestly cannot be reached when inferior or defective material was used throughout the locks.

There must be no wilful or intentional departure and the defects must not prevent the whole or be so material that the object which the parties intended to accomplish is defeated; that is to have locks requiring a minimum of attention at the time needed and when ordered.

The rule is well stated as follows in Foeller v. Heintz, 24 L. R. A. (N. S.) 327, 137 Wis. 169, 118 N. W. 543, that:

> "To constitute substantial execution of a building contract, or one to supervise and direct the construction of a building according to specific plans and with the usual architect's duty in such cases, the structure as completed must be the result of good faith efforts to perform strictly, and must satisfy with exactness all essentials to the accomplishment of the proprietor's purpose."

It was held in this case that where the defects were of such a character as to compel a partial reconstruction of the building that that was not a substantial performance.

Also, see:

> Bush v. Jones, 144 Fed. 942, 6 L. R. A. (N. S.) 744.

Besides failing to furnish proper locks the appellee also failed to provide locks as needed.

The record shows that the appellant was never able to get shipments on time and that as a result of the delays in shipping, lost a great many locations.

The cash value of the locations so lost was of course too speculative to recover as damages, but this fact did not excuse the failure of the appellee to furnish the locks when ordered for these locations.

The conduct of the appellee is still more reprehensible when the fact is taken into consideration that the appellee knew that the appellant was losing locations because of its procrastinating policy in delaying shipments. [Tr. p. 230]:

> "We have lost three splendid locations in the city of Los Angeles because we did not have locks to equip toilets with. Your inability to supply us with locks will cut into our income.
>
> The locations lost are excellent locations—as good as any we have, outside of possibly the Pacific Electric. You will have to arrange some way to take care of these orders we send you, if you expect us to compete. It is disheartening to go out and convince a man that our proposition is the best offered, promise to put locks on within a certain time which he demands and then have you wire us and tell us you can't furnish us with the locks."

[Tr. p. 337]:

> "Q. By Mr. Newby: Now, Mr. Miller, you stated that certain locations were secured in the city of Seattle. Were there any locations secured from the city? You mentioned an ordinance was passed. A. I recall that very well, because I secured that myself. The contract with the city of Seattle was an ordinance passed by the City Council and signed on the 14th day of July, 1920. We were unable to secure locks, although we made repeated requests by wires and letters, and every week or two for a

year, and were finally advised by our attorneys in Seattle that the city had put on some locks that they had secured elsewhere. But we again, through our attorneys in Seattle, were enabled to get the contract renewed, and finally we got the locks and put them on the 7th day of July, 1921, more than a year after we had requested them.

Q. I will ask you to state to the court whether or not in your opinion you could have secured additional locations prior to the termination of this contract if you could have secured locks to put on the locations? A. Yes, indeed; there were several very attractive avenues for new business which I purposely refrained from trying to get, because we had neither a supply of locks nor locks that would work.

Q. Can you tell the court any particular locations or case that came in that category you have just mentioned, that you had it arranged, but could not get locks of the kind or quality desired? A. Southern Pacific Railroad."

The appellee offers no excuse for this delay except that in 1922 it was going into a merger and couldn't manufacture the locks during that time.

With such a situation it would have been folly for the defendant to remain tied to the plaintiff any longer jeopardizing its present business and rendering impossible any future expansion.

In the cases of Pacific Sheet Metal Works v. California Canneries Co., 164 Fed. 980, and California Canneries Co. v. Pacific Sheet Metal Works, 144 Fed. 886, it was held that under a contract which required defendant to furnish plaintiffs with all the tin cans required in its cannery during a season, not exceeding a stated

number in any one day, with a proviso that it should be released from any obligation if it should be unable to perform by reason, *inter alia*, "of damage by the elements or of any unavoidable casualty," it was no defense to an action for breach of the contract for failure to furnish the number of cans required that defendant contemplated the use of a cargo of tin which at the time the contract was made had been shipped from Liverpool for San Francisco by way of Cape Horn, and that by reason of adverse weather the vessel was longer than usual in making the voyage, there being no provision in the contract with respect to such shipment.

This case is almost on all fours with the case at bar. The Sheet Metal Co. failed to deliver the cans regularly or in the required amount, causing the defendant extra work, expense, lay-offs and the loss of fruit. The Canning Company was constantly complaining and demanding cans, but Metal Works Company failed to supply on time.

The Sheet Metal Works Company put up the same line of excuses as the appellee in this case, namely, that there were strikes and shortage of materials, etc., but the court held that the Company had failed to substantially perform.

Enough has been said on this subject of substantial performance as the court is familiar with these fundamental rules governing the performance of contracts.

However granting for the sake of argument that the appellee did substantially perform still the appellant may recoup in damages the losses sustained by virtue of the failure of the appellee to completely perform

Canifornia Canneries Company v. Pacific Sheet Metal Works and Pacific Sheet Metal Works v. California Canneries cited *supra.*

In the instant case the proven damages suffered by the appellant by virtue of the appellee's failure to perform was $11,027.50, representing the actual cost of making the locks work and conform somewhat to the warranty, and $23,875.45, the loss of profits due to defective locks being removed from locations by sub-lessees, a total loss of $34,902.95.

The great loss of business due to the failure to get proper locks on time being too speculative cannot be recovered, but this fact does not excuse the appellee nor prevent the appellant from terminating the contract on April 23, 1923.

V.

Defects in Findings.

Although findings of fact are so labeled, it does not always follow that they are true findings of fact. In the instant case the alleged Findings of Fact Nos. VI and X are conclusions of law, and it is upon these conclusions of law that the court based its judgment.

These findings are as follows:

"V.

> "That at various and sundry times from and after the said February 23, 1915, plaintiff delivered to the defendant, Pacific Coin Lock Company, large numbers of coin controlled locks covered by the said letters patent belonging to plaintiff, to be used by the said defendant, Pacific Coin Lock Company, in accordance with the terms and conditions of the aforesaid contract.

X.

"That plaintiff acted promptly and immediately brought suit against defendant for damages for breach of contract."

The recitation in Finding No. VI that the "plaintiff failed from time to time in living up to its agreement." The defendant, however, did not take advantage of these situations as they arose from time to time is a statement of a conclusion of law and not a finding of fact. The ultimate facts upon which this conclusion is based are not found. Standing as it does it means nothing.

Finding No. X must fall for the same reason. This finding states that the "Plaintiff acted promptly and immediately brought suit against defendant for damages."

Bearing in mind that the rules of law applicable to pleadings are governed by California law, in the instant case, an examination of the authorities definitely establish the following propositions:

1. Unless waived written findings of fact are necessary.

C. C. P. 632, 633; 24 Cal. Juris. 931.

2. Must find on all material issues raised by pleadings.

24 Cal. Juris. 935; 940 C. C. P. 632, 633;
2 Cal. Juris. 1032.

3. Court cannot make findings on issues not raised by the pleadings and must conform to the same.

24 Cal. Juris. 977, 983.

4. Findings must be findings of ultimate facts and not conclusions.

24 Cal. Juris. 968.

5. Must not be inconsistent and contradictory.
   24 Cal. Juris. 965.

6. Must conform to and be supported by the evidence.
   24 Cal. Juris. 990.

7. Must support judgment.
   24 Cal. Juris. 996.

Proposition No. 1 is so elementary as to not need discussion save to refer to the code section. We discuss the remaining propositions by number.

2. Finding on Material Issues.—The rule is well stated in 24 Cal. Juris. 940:

> "It has been repeatedly affirmed that where a court renders a judgment without making findings upon all material issues of fact, the decision is against law, and constitutes ground for granting a new trial in order that the issues of fact may be determined, or for reversal upon appeal, * * *"

In the case at bar the court failed to find on the question of the plaintiff's failure to perform its covenants and the defendant's counterclaim, though it attempted to do so in Finding No. VI. As will be discussed later, this finding is nothing more than a conclusion of law. There is nothing in the findings concerning the defendant's right to counterclaim, all of which must be covered by the findings or there is a failure to find on all the issues.

3. Court cannot make findings on issues not raised by pleadings.

In 24 Cal. Juris. 983, the rule is stated as follows:

> "Findings outside the issues are not conclusive upon the parties in a subsequent action, and may

> not, for the purpose of determining whether the findings support the judgment, be considered in the action in which made, for a party must recover, if at all, upon the case made by the pleadings and evidence, and not upon another case which might have been made. If, without such findings, the judgment is insufficiently supported, it may be reversed, * * *"

In the instant case the plaintiff failed to plead damages for loss of rentals on locks and wrongfully introduced evidence over the objections of defendant concerning the number of locks in defendant's possession on April 23, 1923. All of this has been discussed in the forepart of the brief and will not be repeated here. There was no issue raised either by the pleadings nor the evidence as the case was not tried on the theory of an action for recovery of rentals due on the locks or the rental value of the locks. This being the case, the court erred in making amended finding No. IX and then basing conclusions of law upon the same.

Finding No. IX having been erroneously made, the conclusions of law and judgment based thereon must also fail.

4. Findings must be ultimate facts and not mere conclusions.

> "Findings of fact and conclusions of law, when filed, constitute the decision of the court upon a cause submitted for its determination. It is the purpose of findings to dispose of the issues of fact and to exhibit the grounds upon which the judgment rests * * *."
>
> 24 Cal. Juris. 927.

"The findings of fact should be definite and certain. They should be so framed that the defeated party can specify intelligibly the particulars in which they are not supported by the evidence, where such point is made, and that an investigation is not required upon review to determine what issues have been decided. While extreme accuracy of statement and minuteness of detail are not required, findings are insufficient if they merely tend to establish the fact in issue, or state only general conclusions leaving in doubt what particulars are established."

24 Cal. Juris 963.

The rule is well stated in 24 Cal. Juris. 968:

"It has been frequently observed that findings should be of ultimate facts, and that it is unnecessary to state the probative or evidentiary facts, for a finding of ultimate facts includes a finding of all of the probative facts necessary to sustain it. Since ultimate facts are required to be pleaded, it is only necessary, in order to determine the sufficiency of a finding of fact, to ascertain what statement of that fact is required in a pleading. It follows that statements of conclusions of law or of the reasons of a judge for his decision are insufficient as findings. And a statement of mere matters of evidence is insufficient unless the ultimate fact necessarily results therefrom."

In the instant case there is no finding of ultimate facts but merely conclusions of law.

The basis of distinction between findings of fact and conclusions of law is discussed in 24 Cal. Juris. 927-931, Sec. 177, 178:

"It is in many cases difficult to distinguish between findings of fact and conclusions of law; the ultimate facts are not in all cases found only from direct evidence, but are to a great extent presumed from the existence of other facts, or arrived at by an inferential process, in which the evidentiary facts become the premises and the ultimate fact the conclusion. In most cases the question is determined by a consideration of the means by which the result is obtained. If, it is said, from the evidence, the result can be reached by that process of reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such. If, on the other hand, resort must be had to the artificial processes of the law in order to reach a final determination, the result is a conclusion of law. Any doubt as to the category in which the result reached by the court belongs is to be resolved in favor of the judgment.

"Illustrations.—As illustrating the distinction between findings of fact and conclusions of law, it may be stated that the following have been held to be findings of fact: that a party did not rescind a sale, that he was not compelled to pay certain moneys for which reimbursement was sought, that he had no prescriptive right, or that he kept blasting powder, or had been greatly damaged, that a street was a public highway, that a testator was of unsound mind, that a cause of action was barred by the statute of limitations, that an agreement was cancelled by consent, that an article was made and delivered according to contract, that a judgment was not lien upon premises, that an action had been abandoned, and that there was or was not another action pending.

"On the other hand, the following have been held to be conclusions of law: that plaintiff has been guilty of laches, that a lien was not filed within the

time required by law, that an assessment was valid, that a party was or was not guilty of willful desertion or extreme cruelty, that the consideration for a contract failed, that a sum of money was or was not owing from one of the parties, that a party was or was not entitled to recover judgment, that a judgment was final, that one did not convert property, that a building was a nuisance, and that a transaction was a mortgage and not a pledge. It is firmly established that ownership may be pleaded and found as an ultimate fact; but it is equally true such averment may be a conclusion of law, and may be determined by the court as such a conclusion. The preliminary recital relative to appearances or defaults of parties which is usually inserted in findings is not in reality a finding of fact, and a statement by a judge of his reasons for a decision is neither a finding of fact nor a conclusion of law."

When tested by the rule above stated it would seem that the only finding of fact bearing on the judgment, which is a true finding, is "that on said April 23, 1923, the defendant had in its possession six hundred and four (604) locks."

It is upon this finding that the judgment must rest. All other portions of the findings of fact are conclusions of law.

As has been pointed out *supra* this finding was not within any of the issues raised by the pleadings.

5. Findings must not be contradictory and inconsistent.

As stated in 24 Cal. Juris. 965:

"Findings should be consistent. Where there are contradictory findings about matters material to the

> merits of a case, and the determination of them, one way or the other, is essential to the correctness of the judgment, the judgment cannot stand."

In the case at bar findings No. V and No. VI are contradictory. In No. V the court finds that the plaintiff delivered locks in accordance with the terms and conditions of the contract and in finding No. VI finds that the plaintiff failed from time to time to live up to its agreement. What could be more contradictory? Being contradictory and inconsistent they fail to support the judgment and constitute ground for reversal.

24 Cal. Juris. 965.

6. Findings must conform to and be supported by the evidence.

This of course is elementary but we cite 24 Cal. Juris. 990 as stating the rule clearly and succinctly as follows:

> "It has been repeatedly held findings of fact must conform to and be supported by the evidence. A judgment which rests for its validity and support upon a finding which is contrary to the evidence cannot be sustained, but may be set aside upon appeal, or motion for new trial."

In the case at bar the court permitted evidence to be introduced, over defendant's objection, upon questions not within the issues and proceeded to make findings on the basis of the erroneously admitted evidence. We refer to the introduction of Exhibit 21 showing the number of locks in defendant's possession on April 23, 1923. If there had been other evidence properly introduced and the facts had been within the issues the finding would

have been immaterial, but here the whole judgment is one for rents based on this Exhibit 21, upon an issue neither pleaded nor proven.

7. The findings must support the judgment.

24 Cal. Juris 996 states the rule in the following language:

> "In view of the fact that judgment must be entered upon the decision of the court—that is, the findings of fact and conclusions of law—it is obvious that the judgment as entered must be supported by and conform to the findings. This must affirmatively appear from the findings * * *."

It will be seen from the above statement that when the judgment is based on findings which are inconsistent and contradictory, or when based upon findings outside of the issues it is not supported by the findings.

To the same effect is:

Gamache v. South School Dist., 133 Cal. 145.

In conjunction with this discussion of defects in the findings it might be well to pause for a moment to also call to the court's attention that the conclusions of law should be drawn from findings and not from other conclusions of law.

24 Cal. Juris. 1002.

It is also true that judgments based upon conclusions of law which themselves are not supported by findings must fall.

CONCLUSION

In conclusion we wish to call the court's attention to the fact that the appellee has failed to either properly allege or prove any facts upon which the District Court could have given a judgment for the rental value of the locks. That the District Court has also failed to make any findings of fact or conclusions of law which would justify or support the judgment rendered.

We wish to further point out, however, that the appellant has properly pleaded and proven its items of damages on its counterclaim, and due to the failure of the lower court to make any proper findings upon the question of the appellant's counterclaim, the Appellate Court is without proper findings upon which it can base a judgment in favor of the appellant for recovery on its counterclaim.

For these reasons we request that this court reverse the judgment insofar as it gives damages to the appellee for the rental value of the locks and to remand the case to the lower court for a new trial on the question of the appellant's right to recover on its counterclaim. That this form of procedure is in accordance with the practices of the Federal Court and the California courts is well settled in the leading case of Title Insurance and Trust Company v. Ingersoll. 158 Cal. 474, 493, and the authorities cited therein.

In making this request the appellant does not wish to lead this court to believe appellant waives any rights which it may have against the appellee for its failure to perform its covenants and for the damages which appellant suffered by virtue of the wrongful acts of the appellee as shown by the record.

Respectfuly submitted,

NEWBY & NEWBY,
By NATHAN NEWBY,
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Of Counsel.

No. 5644

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC COIN LOCK COMPANY, A CORPORATION OF CALIFORNIA,
Appellant,

v.

COIN CONTROLLING LOCK COMPANY, A CORPORATION OF ARIZONA,

Appellee.

APPELLEE'S BRIEF

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FILED

Indianapolis Commercial Printing Company, Indianapolis.

CITATION OF AUTHORITIES

QUESTIONS DISCUSSED IN THIS BRIEF

I.

The complaint and answer were broad enough in their scope, and the evidence sufficient to sustain the judgment of the court below. Pages 6 to 11.

II.

The court committed no error in finding against the appellant on its counterclaim. Pages 11 to 33.

III.

If error at all appears in the record it is against appellee on a proper interpretation of the contract. Pages 33 to 45.

IV.

The decision and judgment of the court below was right as shown by the record, and substantial justice was done. Page 33.

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Appellee.

No. 5644.

APPELLEE'S BRIEF

I.

STATEMENT OF THE CASE

This is an action for a breach of the contract copied in full as an "Appendix" on the last pages of this brief.

There are so many errors and inaccuracies appearing in the statement of appellant's brief that we feel impelled to make a brief statement, as we cannot accept, in its entirety, the appellant's statement.

The Coin Controlling Lock Company, an Arizona Corporation, was the owner of certain letters patent for the manufacture of coin controlled locks used on the doors of toilets

and rest rooms. Said company was manufacturing its locks at Indianapolis, Indiana, and on February 23, 1915, the business of manufacture and using coin controlling locks was in its infancy, and the locks used had not attained a stage of perfection or we might even say to a state of fair efficiency. On the above date the Arizona Company entered into a written contract with one Charles Garrison of Los Angeles (Tr., p. 8), by the terms of which the plaintiff agreed to furnish Garrison one hundred locks per year to be by him used in the State of California. Garrison agreed to pay ten dollars per lock per year, payable in annual installments on January first and July first of each year.

Garrison was made the exclusive agent for the Arizona Company in the State of California for a period of one year, with the contract providing that it would be automatically renewed each year. (Tr., p. 9.)

The Arizona Company agreed to lease additional locks to Garrison for his exclusive use in said territory, subject to all the conditions and on the same terms as the 100 locks were leased, payable in the same manner. In consideration of Garrison being made the exclusive agent of the Arizona Company Garrison agreed to use due diligence in an effort to sub-lease said locks in the territory on sub-lease forms to be furnished by the Arizona Company, and agreed to immediately notify the Company of the exact location of each lock so installed and the name of the owner and to deliver to plaintiff a copy of the contract.

The contract provided that the sub-leases which Garrison was to secure was to be for locks of the Arizona Company (Tr., p. 10) and that upon the sub-letting of such locks on such leases "the same are hereby assigned to the company as a guarantee that the lessee will faithfully carry out and abide the terms of this contract." Lessee agreed not to use or maintain any other or different locks than those of the Arizona Company. The contract also provided, on violation

of any of the terms of the contract and on demand, Garrison should surrender to the company his lease title to the locks, but was not to remove them from the positions installed and that the lessee should surrender to the company all its interest in all sub-leases and locks leased thereunder and coins therein.

The Arizona Company guaranteed its locks as to material and workmanship, but not as to operation and agreed to keep them in repair except as to minor defect, and to replace, free of charge, any lock that was defective, provided the lock be returned to the company at its main office. The contract contained a provision for liquidated damages in the event of a violation of the terms thereof by the lessee, such liquidated damages being stated as the funds in the locks at the time of the violation.

The appellant company, the Pacific Coin Lock Company was organized under the laws of the State of California, Mr. Garrison being an incorporator and stockholder, and immediately, for value received, assigned his contract to the appellant and it immediately commenced operation thereunder. Later the contract was extended to cover the states of Texas, Washington and Oregon. The appellant proceeded to and did, pursuant to the terms of its contract, procure a great many sub-leases in which to use the appellee's locks, which sub-leases were on forms approved by the appellee. The appellant, however, did not assign said leases to appellee as provided in the contract.

All the sub-leases obtained were with the distinct understanding that the appellee's locks were to be installed and no other, although the sub-leases did not in specific terms make this provision. (Tr., pp. 51-52.)

During the years from the time of the execution of the contract to April 23, 1923, the appellee furnished appellant

a great many locks, but appellant did not install the locks in the same condition as furnished by appellee, but on the contrary undertook to work the locks over and change them without the consent of the appellee or without returning them to appellee for repairs. This was the source of much dissatisfaction in the use of the locks. Appellee was not at all times able to furnish as many locks as the appellant requested, due in part to shortage of labor and the difficulty of obtaining material during the war, and other reasons. Appellant understood this, but made no effort to have the contract terminated on this account. Probably due to the fact that the contract was proving extremely remunerative to appellant, for in the year 1922, as shown by the evidence (Tr., p. 177) the Pacific Coin Lock Company received net collections of $31,404.88 on 500 locks then in use. The appellant had the right, under this contract, to keep ten locks in storage without charge to be used when locks were required to be removed and sent to the home office for repairs. Appellant usually kept on hands a very much larger number than this without paying rental on them and desired to keep on hands 100 locks free, as charged in appellant's brief (Tr., p. 36), so that they could readily install them as soon as they obtained contracts.

The appellant sought to obtain a modification of the contract so as to procure one or more favorable terms (Tr., p. 212), and failing to do this the appellant on April 23, 1923 (Tr., pp. 64-65), repudiated its contract by refusing to receive locks from the appellee, and by removing appellee's locks and installing locks of another company on the premises covered by the sub-leases which were made for appellee's locks, the appellant at the time acting as the exclusive agent of the appellee in the State of California, and further by refusing to deliver to appellee the sub-leases as the terms of the contract required.

Appellant immediately upon such repudiation of the contract filed its bill in the U. S. District Court for the Southern

District of California, to enjoin appellant from removing its locks from the premises covered by the sub-leases taken on its behalf, and provided in its contract, and said cause was pursuant to the order of the court transferred to the law side of the court and the second amended complaint for breach of the contract was filed, to which the appellant filed an answer and counter-claim. (Tr., pp. 21-27.)

The appellant has, at great length, undertaken to state what Judge Bledsoe said and did with respect to the transfer, but this is entirely outside of the record, and, therefore, should receive no consideration. A search of the record shows nothing with respect to the case being transferred except a recitation in the amended complaint stating it was filed pursuant to the order of the court. A jury was impanelled to try the case, but later the parties filed a written stipulation waiving a jury and agreeing that the court should complete the trial of the case without a jury. The court rendered a memorandum decision (Tr., p. 657) and later findings-of-fact and conclusions of law and judgment, all as set out by the appellant in its brief.

APPELLANT HAS NOT COMPLIED WITH RULE 24

It is doubtful if any question is raised for consideration by this court because of the failure of appellant to follow Rule 24 in the preparation of its brief. It has not followed the rules in the following particulars:

(a) It has not presented, in the statement of its case, the questions involved and the manner in which they are raised. The complaint is not set out or abstracted, or the page of the record given where it may be found.

(b) It has not stated in its specifications of error the specifications relied on, nor the degree in which they are alleged to be erroneous.

(c) It has not in "A brief of the argument" exhibited a clear statement of the points of law or fact to be discussed, *with reference to the pages of the record* and the authorities relied on to support each point.

(d) The brief on page 5 in its "Statement of the case," and all of pages 21, 22 and 23 of the argument contains much extraneous matter not appearing anywhere in the record.

(e) At no place in the "Statement of the Case" or in the "Specifications of Error" are any pages of the record cited.

This manner of preparation of the brief has entailed upon appellee's counsel and will require of the court considerable thumbing of the record in order to examine the parts to which reference is made, and makes it easy for appellant to insert matters not in the record.

Without waiving the appellant's error in not complying with the Rules of this Court, and without undertaking to supply all the defects in its brief, we shall undertake to answer the questions raised in its argument, in the same order and under the same headings.

ARGUMENT

APPELLANT'S SUB-DIVISION

I.

The Amended Complaint Fails to Properly Allege Any Facts or Damages Upon Which the Court Would Have Been Justified in Giving its Judgment for the Rental Value of Locks Used by the Appellee.

1. What is said by appellant under this head on pages 21, 22 and 23 of its brief must be wholly disregarded for the reason that such matters are extraneous to the record, and the decisions cited thereunder can have no effect because

they are not related to any issue tendered by the record in this case. The so-called original bill and what ruling Judge Bledsoe made and what he may have said cannot be found in the record.

2. What appellant says on page 24 and the following pages of its brief, on the theory of the complaint, is difficult to follow inasmuch as it has not set out the complaint nor an abstract of it, nor given the page of the record where it may be found. We understand that this is a waiver of any assignment as to the complaint; the prayer of the complaint is found on page 25 of appellant's brief, which is self-planatory, three separate demands for damages for the breach of the contract *and a general prayer for relief.*

We agree with appellant that under 724 United States Judicial Code, the practice in the State Courts of California generally prevail, except where otherwise provided by Federal law. With this in mind, Section 850 of the California Code makes the prayer sufficient. Section 850 reads as follows:

1. 850 *California Judicial Code:*

> "The relief granted to the plaintiff if there is no answer, shall not exceed that which is demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issues."

2. *Rollins v. Forbes,* 10 Cal. 299:

> "If the specific relief asked cannot be granted, such relief as the case stated in the bill authorizes, may be had under the clause in the prayer for general relief, and in the absence of such clause, when an answer is filed."

> *Kans. v. Colorado,* 185 U. S. 125.

3. *Ginney v. Ginney,* 22 Cal. 633:

> "Where a defendant appears and answers the court

may, under Section 850 of the practice act, grant any relief consistent with the case made and embraced within the issue, although not specifically prayed for."

Myers v. City of County of San Fran., 150 Calif. 131;
Cummings v. Cummings, 75 Cal. 434.

4. Jurisdiction to grant any particular relief depends not upon the prayer of the complaint but upon the issues made by the pleadings.

Murphy v. Stelling, 8 Cal. 702;
Reinier v. Schroder, 146 Cal. 411;
Bedola v. Williams, 15 Cal. App. 738;
Moch v. Santa Rosa, 126 Cal. 330.

According to the provisions of this California statute and the decisions of the courts of last resort of said state construing it; it follows that appellee's recovery was not limited to the prayer of its complaint, but could recover under any theory embraced within the issues, if there was a general prayer for relief. The burden is upon the appellant to show that the findings and judgment of the court below was outside the issues tendered by the pleadings. This it has signally failed to do. In fact it has not brought before this court either by quotation, or reference to the record, what the issues were, except that pages 24 and 25 of its brief in the argument it purports to copy (without reference to the record) a part of the complaint. That part copied shows a written contract referred to as "Exhibit A" was a part of the second amended complaint and that this contract formed the basis of appellee's cause of action, yet no effort is made by appellant to bring this contract or its contents before the court, or citing wherein the record it may be found, that the court might consider it along with the allegations of the complaint, and determine what was embraced within the issues. We insist that in the absence of any such showing this court must presume that the finding, conclusions of law and judgment of the court below was clearly within the issues.

3. Beginning on page 28 appellant in its brief under the same heading as the foregoing, discusses at some length the question of "Special Damages" and cites many authorities to show that special damages must be specially pleaded. We have no quarrel with appellant as to this being the law, but fail to see its pertinency here. Appellant's counsel is evidently confused as to what the court did in this case. On page 11 of appellant's brief, it shows the court found (Finding III) that appellee and one Garrison entered into a contract at Indianapolis for the rental of locks at a price named, this contract was afterwards assigned to appellant (Finding IV, Appellant's brief, page 12) that appellee shipped to appellant a large number of the locks. (Finding V, page 12.) That under the terms and conditions of the contract the appellant had the right to terminate it on December 31st of any year. (Finding VII, page 13, Appellant's brief.) That appellant gave notice on April 23, 1923, that it had terminated the contract, that it had in its possession at that time 604 locks chargeable to it at $5.00 each for the last six months. (Finding IX, page 13, Appellant's brief.)

In no sense of the term could this be said to be a finding of "special damages" it was a matter of damages flowing naturally and necessarily to appellee by the express language of his contract—a promise to pay rent which became due when he terminated the contract by breaking it, at the time and in the manner alleged, and when the court decided that plaintiff should not be allowed to recover the other damages claimed in its complaint, it had a perfect right under the law, and under the general prayer for relief to award such relief as the law and facts justified, to have done otherwise would have been a miscarriage of justice.

APPELLANT'S SUB-DIVISION

II.

By Failing to Allege the Loss of the Rental Value of the Locks, Either as General or Special Damages, the Appellee Was Precluded from Introducing any Evidence as to the Loss of Rents from the Locks.

What we have said under heading I applies with equal force to and answers all the appellant has said hereunder.

Appellant does not deny that ample proof was adduced, but claims it was inadmissible because there was no allegation as damages for the rental of locks. Here again appellant is mistaken for on page four of its brief reference is made to such rental and to the contract. The allegations of the complaint are broad and expressly made the contract a part thereof (Tr., p. 14) and said contract expressly provided for rental of locks at $10.00 per year. (Tr., p. 8.) And the construction the lower court put upon the contract made exhibit 21 (Tr., p. 537) clearly admissible under the issues. The appellant is in no position to complain as to the construction placed upon the contract by the court, because the court adopted the theory urged by appellant itself. (See Appellant's answer, Tr., p. 24.) Where it is said: "This defendant avers that the only damages which the said plaintiff in any event would be entitled to recover would be the value of the locks not returned to it *and the rental value of the said locks while in its possession.*" (Our italics.) The appellant having tendered this issue it cannot be heard to complain if the court adopted its theory and held that it tendered an issue and heard evidence and made findings thereon, especially in view of the fact that appellee has accepted the finding and judgment.

APPELLANT'S SUB-DIVISION

III.

THE COURT ERRED IN GIVING JUDGMENT FOR THE APPELLEE AND SHOULD HAVE GIVEN JUDGMENT TO APPELLANT ON ITS COUNTERCLAIM.

The dual nature of this heading makes a rather broad subject and involves everything in the entire case, and not having been shown to be related to any particular assignment or specification of error makes it difficult to answer with any degree of brevity. We have attempted to analyze this discussion and find the appellant has chosen from a great mass of letters, telegrams, reports and other documents bearing date of the year 1920 and previous years (which was two years before the breach April 23, 1923) and supplemented their exhibits, remote in time from the alleged breach by the testimony of Mr. Hervey and Mr. Miller, the two stockholders of the appellant company and certain employees of appellant, and upon this showing alone are asking this court to determine that it was justification for the repudiation of the contract two years later. The lower court had before it other evidence more pertinent and more recent than this, and had the opportunity of observing Mr. Hervey and Mr. Miller while testifying, and had before it other exhibits at and quite near April 23, 1923, all of which showed the court had ample testimony upon which to base its findings.

It might here be pointed out that most of the letters and exhibits were merely self-serving declarations on the part of appellant's officers, and many of the exhibits were based wholly on hearsay, such as the report, being defendant's exhibit A-31 shown on page 60 of appellant's brief. (See Tr., p. 618.) Where Cosby testifies it was made up by what others told him. Being a trial by the court a great deal of latitude was accorded in the introduction of testimony, the

court being cognizant that in the last analysis, it would decline to consider incompetent or irrelevant testimony. Moreover, the witnesses whose testimony is set out by appellant are contradicted by other evidence and materially weakened on cross-examination reference to which is hereby made.

FACTS TO WHICH APPELLANT MADE NO REFERENCE

That most of the trouble which appellant had to which reference is made in the various exhibits was due to interference with the locks. In a letter from the company dated February 23, 1923 (Tr., p. 326), the company said:

> "Seventy-five per cent of our trouble with your old style lock has been caused by patrons stuffing paper in the keepers."

Again, Mr. Miller, the president, testified (Tr., p. 454): "We are also having a lot of trouble with malicious interference with the locks, such as taking off knobs and putting in sticks, etc." That was always true.

That thieves caused a lot of trouble of which complaint was made.

Tr., p. 294: "Yesterday at Long Beach we had seven locks robbed, all being gotten into by prying off the cash door."

Tr., p. 301: "Yesterday one of the new locks installed was completely pried off the door and cash door taken. No doubt the making of a key to fit the stolen cash door will be attempted and shows the importance of having the cash keys made in series."

Tr., p. 302: "Six locations equipped with latest model lock using Baird Cash key unlocked and robbed last night disproving Baird statement that key can-

not be duplicated. Unless robbers caught and keys recovered there will be no end of loss to all of us."

Tr., p. 303: "Locks operating with keys No. CA701 and 2025 being robbed daily. Have spent over two hundred dollars in past month for detective services without any results."

Tr., p. 309: "We stated in previous communications that keys have been duplicated and locks are being robbed * * *. We also have many locks that can be picked through coin slot, which must be replaced."

Again, Tr., p. 309: "We are sending you under separate cover one of the cash doors which was broken from the locks. This is done by hitting same with hammer or similar instrument breaking the ends of the door. The two case screws are then removed and cash doors taken and keys made to fit them. This has been done at various locations and a duplicate set of the new Yale cash keys have been duplicated and locks are being opened, money taken and cash doors put back into locks again.

The cash doors should be made of stronger metal as you will note the one we are returning to you is full of small holes and very easily broken. This morning when collecting at Long Beach, we found that every location had been robbed and cash doors put back into locks."

Tr., page 549: "Well we had a lot of robberies, and in cases there were cash doors taken off. * * * We blamed it to the sailors. They ripped off many locks, and we could not even find any of the parts to them. In one period of about two weeks we lost at least a dozen locks. We had trouble at Venice, a similar case, and one P. E. Station lock down at the beach, another P. E. Station at Long Beach, besides other repairs around town, at the Haywayd Hotel, Lankershim Hotel, the Rosslyn, and numbers of other places."

Tr., p. 548: Cosby, the general manager said: "I might say that at least 95 per cent of the complaints were minor complaints, such as paper being put in the

keeper, or a match in the slot, or a crooked slug, and at least 5 minutes after we got on the location this trouble was overcome."

Tr., p. 450: Mr. Miller: It is a fact that a large percentage of the trouble with this lock was due to tinkering with the locks, and robberies, and putting toothpicks in them, and stuffing paper in the locks, and people trying to get into them, or into the coin box. This is true of every coin lock built. You can't keep people from sticking gum, nails, files and everything into that little slot.

Surely the appellant would not contend that appellee was making any guarantee against such vandalism, and the fact that the locks were broken or picked or otherwise interfered with in any way constituted a breach of the contract, and we have the admission, as shown on February 3, 1923, which is near the date of the repudiation of the contract, showing that 75 per cent of the trouble was of this character.

The evidence shows that the appellant was not installing the locks as they were received from the factory, but were changing them and tinkering with them before they were installed.

Tr., p. 452: Mr. Miller: We did not install these locks as they were sent to us, on two or three occasions I demanded that they be installed exactly as sent, but as a general rule we worked them over. I knew they were being worked over by our men before they were installed. I knew they were not using the keepers sent with these locks. We made a keeper of our own. I was informed of that at the time they began using the other keepers. I left the matter of the conduct of the business largely up to the boys installing the locks and doing the collecting and looking after the trouble. Mr. VanCleave called my attention to it.

Tr., p. 453: I told them hereafter I wanted them installed exactly as they sent them. This was in 1922.

"I wrote Mr. VanCleave we were going to do that. I wrote him that I had been trusting it to others to look after the mechanical end of the business. I said your letter convinced me that it has not been done as it should be. I meant that at the time—in 1922. I told him I was greatly surprised to learn that they were using those keepers." Afterwards I wrote Mr. Vancleave about it. (Tr., p. 454.) In the letter I admitted Mr. Vancleave knew more about it than my men.

Tr., p. 634: Mr. VanCleave: The appellee company made objection to this as early as August, 1922. (Tr., p. 634.) Letter from Mr. VanCleave saying: "Now Garrison, you gentlemen are absolutely wrong about this keeper situation and you cannot make me believe that it isn't 75 per cent of all your trouble. I make the statement without any qualification whatever, that your business is positively the only place that we have any complaints and I do wish we could get you to co-operate with us, for I tell you this has cost us and is costing us a lot of money."

That the locks were not of the kind as represented by appellant but were reasonably satisfactory is shown by the record (Tr., p. 428) as shown by a letter from one of the largest users, namely, The Pacific Electric Company, from which we quote:

"It is with pleasure that we state that your (Tr., p. 429) service has improved from year to year and at the present time we have nothing but words of praise for it.

I am very happy to call attention to the fact that in addition to the income which we receive and the fact that your locks serve a class of our discriminating patrons, there is another valuable asset to us in this, etc."

And in a letter from Mr. Miller, July 26, 1921, Tr. R., p. 449, he says:

> "I am advised that the last locks you sent us seem to be working very well mechanically."
>
> In February, 1920, he said (Tr., p. 445): "Mr. Garrison has written you a letter making all of the suggestions concerning improvements on the new lock. All I have to say is that it is a wonderful improvement over anything that has been put out in the shape of a coin lock. I am almost ready to say it is perfect, but I know better than that. Nothing every stands still. Next year you will have a lock that will be an improvement over this very good one that you have assembled now."

Tr., p. 627: Donald C. Morgan, an engineer of 15 years' experience in adjusting, manufacturing and patenting coin locks testified that he was familiar with appellee's locks and they were as good as any lock on the market at the time. In fact the Hervey locks which were installed in lieu of appellee's locks brought the same complaints as those made against appellee's. (Tr., pp. 625-626). Men were locked in toilets with the Hervey locks. (Testified to by Mr. Keith, one of the employees and not disputed.)

The record disputes the fact that appellant did not have locks on hand, shown by the testimony of Mr. H. J. Cosby, who was in fact general manager of the company. (Tr., p. 550.)

> "There was times we had plenty of locks, more than we needed, and may have been times when we were a little short as I recall, a week or so."

And in a letter of August 23, 1922, appellant admits it had locks on hands but desired a different style of lock. This changing of the style of lock is the cause of most of the demand for locks as shown by the telegrams and letters to which appellant refers.

Then, again, appellant had a practice of ordering locks

that were not needed, which is not according to the terms of the contract, but shows that they wanted them on hands to install immediately after they procured a contract. We take it that a failure to fill such orders would not be a breach of the contract. Mr. D. L. Cosby on page 599, who was in charge of the books so testified: Well we ordered some locks, more locks than we needed at times. Our purpose in doing that was to have extra locks on hands, anticipating new business, that we might be able to fill the contracts for any new business.

Again, on page 606 of transcript, Mr. Banister, one of the agents at San Francisco urged the company to not merely order locks for contracts which they had but to *get more than that.*

Again on page 636 of transcript Mr. Miller, president, stated he wanted to be able to install the locks immediately and ordered one hundred locks for which he had no contracts. This was not according to the contract.

As proof that the locks were suitable for the purposes for which they were manufactured is shown by the undisputed testimony in the record as to their ability to meet competition.

Mr. Miller in a written statement of May 19, 1922, transcript, pp. 463-467, both inclusive, in part says:

> "The protection to the coin lock business must be by rendering service and alert business efficiency rather than relying on patent rights. That has been the system of Pacific Coin Lock Company, and we will stack up the dividend paying power of its 500 locks against any other 500 locks in the country." (Tr., p. 465.)

And on page 464 of the transcript he states that the net earnings for the company for the previous year was $32,000.

This rather indicates that appellant was using fairly good locks. H. J. Cosby who was former general manager of the appellant company who quit the company January 1, 1923, and went in business for himself using other makes of locks, but had little success and who began using the locks of appellee after April 23, 1923 (Tr., pp. 531-532) secured appellant's locations with the locks that they discarded (Tr., p. 534; Tr., p. 548). Mr. Cosby says that during the time he was with the Pacific Company using the locks about which complaint is now made, the Pacific Company had practically all the locks in Los Angeles. There were only two or three other lock companies who has locks in use there. He said (Tr., p. 550):

> "I do not know of any new contracts being lost in Los Angeles territory because of the failure of the manufacturer to send us locks."

And in a letter from the appellant company on November 4, 1922, Mr. Crews, speaking for the company says (Tr., p. 597):

> "We have not yet heard from Mr. Liddon, but when we do we believe he will find that it is not so easy to sell locks in our territory, as he expects. For the last three months we have been canvassing our customers very thoroughly and the *majority of them are with us to stay.* He might sell a few small locations. However, we will keep you advised and if we need any assistance will call on you.
>
> We are not surprised that Mr. Heald was feeling peevish when he returned, as we succeeded in spiking his guns in the northwest. We lost only one location to him and that location took in $8.00 per month on four locks. We expect to get that one back within six months, as we have been already advised that their locks were out of order within two weeks after being installed."

Mr. Miller sought to make it appear that lock locations were lost because of the failure to get locks, and the insufficiency of such locks, but in letters which he wrote to the company this is disproved.

> Tr., pp. 432-438, in which he says (on the latter page): "The only two concerns in the business that know the most about it and are run by capable and successful business men are your own company and that of the American Coin Lock Company of Pawtucket, R. I."

This was in 1921, and it appears that Mr. Miller had a rather exhalted opinion of appellee company at that time. In the same letter, Tr., p. 440, he states that all the good locations are going to buy their locks outright unless somebody stops it. And in which he speaks of the Rice Hotel and the Gunter Hotel in Texas doing this. (In his testimony Mr. Miller had stated that these two hotels were lost because he could not get good locks.)

Reference is also again made to this. (Tr., p. 556.)

Some items of evidence appear (Tr., pp. 641-642) where it is shown that the appellee company although not bound to do so under their contract, furnished free of charge to appellant locks in lieu of those broken by thieves and vandals amounting to a considerable number.

There are many other items of evidence of this character and of general character showing in many respects the position taken by the appellant in its brief, pages 38 to 45, is not tenable, but it would extend this brief to an unwarranted extent to undertake to cover all of them.

There is just one more point to which we desire to make reference, and that is the cause of cancellation and we will do this briefly.

The record shows that Mr. Hervey purchased a one-third interest in the appellant company a few days previous to April 23, 1923 (Tr., p. 65). Mr. Hervey, it will not be disputed, was the manager of the General Service Lock Company and the appellant contracted with this company for locks to be used in lieu of the appellees. (Tr., p. 64.) During the preceding six months there is nothing in the record to show that any particular complaint was being made of the service which the appellant was receiving from the appellee. (Tr., p. 66.) Shows a long letter from Mr. VanCleave written on April 17, in which he was planning to go to the Pacific Coast to meet Mr. Miller with reference to enlarging the lock business, and on April 14th, had sent Mr. Miller additional new equipment for his use. The telegram on page 65 shows that Mr. Miller suddenly changed his mind with respect to the proposed trip of Mr. VanCleave and the telegram in transcript, page 64, shows the reason for this—in fact they had arranged to take the Hervey locks. Is it not natural to assume that when Mr. Hervey became a third owner he induced the company to repudiate its contracts with the appellee so that his locks could be used instead, and the claim now made that they had trouble with the locks in 1920 and prior thereto as shown by the evidence brought forward is only a subterfuge. Yet Mr. Miller admits (Tr., p. 457) that he had locks on hand but did not know how many. They had evidently already ordered some of the Hervey locks before sending the telegram as shown (Tr., p. 458). And again, at page 439, in a letter written in 1921, Mr. Miller said he wanted to get the Pawtucket lock because it was "literally foolproof."

On May 19, 1922, in a letter to Mr. VanCleave (Tr., pp. 463-467 inclusive) he specifically asks a cancellation of the contract—this no doubt was done in an effort to relieve the Pacific Coin Lock Company from damages in the event of a breach.

It is clearly apparent from the record in this case that in

1915, when the contract between the parties was made, the lock business was in its experimental stage, and like all other types of machinery and equipment had to be tried out before any degree of mechanical perfection could be reached. All parties must have understood this situation and contracted with respect to this. The contract itself contains no warranty of operation, but simply as to material and workmanship. The parties had in mind the particular type of lock which was then being made by the appellee company the contract provided that in the event of improvements being made that the appellant should have the benefit of such improvements. The whole record shows that appellee did, from time to time, make changes in the mechanism all with the consent of the appellant, and all appeared to be working harmoniously to improve the lock, the appellant making criticisms learned from actual observation and the appellee accepting them in the spirit in which they were offered, and in good faith undertaking to correct the evils. Most of the appellant's complaints on the furnishing of the locks was not due to the number, but they insisted on having a different type and appellant seemed committed to the idea that it was the duty of the appellee to procure a lock that could not be broken with a hammer, pried open with a screw-driver or susceptible to attack of vandals. The court judicially knows that such was not within the contemplation of the parties at the time of making the contract, and that locks on banks, safety deposit vaults were daily being broken by ingenuous thieves and burglars who have ways of getting into a cash drawer. And the business of the locksmith has not yet reached such a state of perfection that locks cannot be picked and doors opened by the designing and criminally inclined class.

In discussing the subject it must be borne in mind that the locks which appellee in its contract agreed to furnish was the model manufactured in 1915 under certain of its letters patent, and it was this design of lock that appellee warranted as to material and workmanship. It appears that appellee

got out several new and different design of locks, as shown by the record. (Tr., pp. 297, 273, 240, 225, 223, 220.) In fact practically all the correspondence, set out in appellant's brief, in which objection was made to the locks, appears to be in the year 1920, and the early part of 1921 when appellee was, with the consent and at the request of the appellant shipping locks not covered by the contract.

> "If machines manufactured under a contract depart from the specifications with the knowledge and consent of the purchaser, he cannot hold the manufacturer responsible in damages for their failure to work."
>
> *J. Thompson Mfg. Co. v. Grenderson,* 49 L. R. A. 859, 106 Wis. 449;
>
> *Bostwick v. Mut. Life Ins. Co.,* 67 L. R. A. 705 (Annotated).

Paragraph 8 of the contract (Tr., p 11) gives appellant the right to use "new devices" under the same terms and conditions which are operative with other similar representatives in other states and territories.

If it can be said that the warranty of "Material and workmanship provided in paragraph 11 of the contract can be extended by implication to these new designs of lock which we doubt from the above authority it cannot be implied that they were to be proof against robbing and picking by thugs and thieves, but this is just what appellant expected. After the experimental stage of the 1920 lock was worked out, which was two years before the breach April 23, 1923, the record shows very few complaints as to the character of the locks. The chief trouble as the court found was in the delay of deliveries at times. The cause of delay in furnishing the locks in the year 1922 was due to appellee going into a merger with other lock companies, by the terms of which but one style of lock made by another company on a large production basis was to be used, and which caused appellee to cease making locks for a time, as this was due to the earnest solicitation of ap-

pellant it cannot claim damages as a result thereof. (Letter of Miller, Tr., p 198, and Tr., pp. 639-647.)

THE APPELLANT CANNOT RECOVER ON ITS COUNTERCLAIM.

1. Where manufactured articles are sold or let to a promisee under a contract of warranty, such articles are to be delivered from time to time and the promisee finds they are not as warranted he has two remedies—he may refuse to accept the articles and rescind the contract, or he may accept them and rely on an action for damages for breach, but he must elect with promptness which remedy he will pursue—he cannot pursue both.

Wallace v. Clark, 21 A. L. R. 385;
Norrington v. Wright, 115 U. S. 188.

2. The strict performance of a contract may always be waived and it is a general rule that whatever is not demanded is waived.

Ruling Case Law, Vol. 6, 990;
Robertson v. Smith, 11 Tex. 211;
VanIderstine v. Barnet Lumber Co., 242 N. Y. 245.

3. ,Therefore, assuming, without admitting, that the locks were not as contracted for, the acceptance and use of the same, and paying rental on them for a period of seven years without any effort of rescission is a waiver of strict performance and estops the defendant from now asserting the locks were defective.

Bostwick v. Mut. L. Ins. Co., 116 Wis. 392, 67 L. R. A. 705;
The Copely Iron Co. v. Pope, 108 N. Y. 232;
Northfield Natl. Bank v. Arndt, 12 L. R. A. 82.

When the contract was made coin controlling locks were in

their experimental stage and in process of development. All parties realized this and contracted with this in mind. The evidence of Vancleave, Cosby boys and Morgan all showed this fact, and showed further that the locks furnished by plaintiff were as good in material and workmanship, and operated as good or better than any other coin locks being used over the country at the time, and much superior to the other locks being used on the Pacific coast.

4. As heretofore stated no notice was given on January 1, 1923 to cancel the contract but the defendant continued to order locks, received and accepted them and make new contracts for locations of plaintiff's locks after the first of the year. In other words, it elected to continue the contract for another year. Mr. Miller had written Mr. Vancleave to come to California to talk over the business and plan for the future (Vancleave, Tr., p. 14). Mr. Vancleave had hurried his new model of lock to him for inspection and criticism. Both parties were evidently planning for a continuance of the contract which had been in effect for seven years, and suddenly something happened. What was it? The evidence shows nothing unusual except the appearance of Mr. Hervey, and, is it not fair to assume, that as soon as Mr. Hervey became interested in the company he wanted his locks used, or that he made the use of his locks a condition precedent to his going in the company?

THE APPELLANT WAS NOT JUSTIFIED IN REPUDIATING ITS CONTRACT ON APRIL 23, 1923.

1. On the trial the defendant claimed it had a right to terminate the contract on April 23, 1923, because of certain alleged breaches on the part of the plaintiff, namely, that the plaintiff did not furnish to it the kind and quality of locks specified in the contract, and secondly, that it did not ship them promptly. The defendant undertook to show that the locks were not of the kind and quality as provided by the terms

of the contract, because the locks would get jammed at times, so that they would lock patrons in the toilets, and at other times would not operate at all, and that the locks were defective in workmanship and material.

2. We desire, at the very beginning of this discussion, to call the court's attention to the fact that the contract carries with it an *express warranty* as to workmanship and material. There is no express warranty that the locks will work perfectly at all times. There was no *implied* warranty with respect to the quality of the locks, because it is a well known rule of law that where a written contract carries with it an express warranty, it excludes all implied warranties, it being conclusively presumed that the parties embodied in their contract the warranty with which they desired to bind themselves, and in this respect went as far as they desired to go. Many cases might be cited on this proposition, but we think the decision of Mr. Justice LaMar on this rule is sufficient:

> "There are numerous well considered cases that an express warranty as to quality excludes any implied warranty that the articles sold were merchantible or fit for their intended use."
>
> *DeWitt v. Berry*, 134 U. S. 306;
> *Osborn v. Nicholson*, 13 Wall, U. S. 654 (and cases cited in those two decisions).

3. The express warranty found in the contract is paragraph four and is as follows:

> "(4) The company guarantees its locks as to material and workmanship and agrees to keep them in proper repair, except as to minor defects, and repair or replace free of charge any lock that is defective, *provided that the lock* be returned to the Company at its main office."

4. It will be observed that this warranty has a condition annexed to it. According to the express condition of the war-

ranty, which provisions and warranty were accepted, it is provided that minor defects and repairs are excepted from the warranty and the conditions of the warranty is that the company will *"replace free of charge any lock that is defective, provided that the lock be returned to the company at its main office."*

In other words, the return of the locks to the plaintiff's main office was a condition precedent to which the defendant was bound to conform before it could claim anything by virtue of the warranty. We assume that this proposition is too well known to require even the citation of authority.

There is no evidence that the plaintiff did not comply with its express warranty in that it refused to replace any locks that were returned as defective or to repair them; there is even no pretense that the defendant ever returned any locks to the plaintiff which it refused to repair. Mr. VanCleave testified that his company had at all times either repaired or furnished new locks for any locks that the defendant returned which were claimed to be defective, and even replaced some which Mr. VanCleave says were not defective, simply because the defendant asserted they were. (Tr., p. 641.) There is no denial or contradiction of this evidence of Mr. VanCleave, so it stands as the record evidence in the case upon this proposition.

5. We think it is a well known rule of law that when machinery, or any patent article is sold under an express warranty even that it will do the work for which it is manufactured (which is not the case here), and a machine is furnished as a completed manufactured article, and the purchaser does not use it in such completed state but changes it in some respects or adds something to it which was not intended by the maker to be used, he is in no position to rely upon the warranty. In other words there is an implied contract upon his part in consideration of a warranty to use the machine as it

is furnished and his failure to do so would be such a breach of such implied warranty as would amount to a waiver of the express warranty—that is by his own conduct he would be estopped from claiming anything under the warranty.

Larson v. Aulburn, etc., 39 Am. St. Rep. 893-9.

6. Attention is called to the fact that this is an Indiana contract and the courts of the State where this contract was executed have construed the law with respect to provision in contracts for the return of machines if not as warranted; it being held that a failure to return such machines and the continued possession and use thereof, after knowledge of defects, is a waiver of the warranty and renders the purchaser liable for the contract price of the machine.

Burke v. Keystone Mfg. Co., 19 Ind. App. 556, and cases cited.

7. Merely writing the seller that the machine sold under such a warranty is not doing satisfactory work, and it is held subject to the order of the seller, is not such a return of the machine as complies with the contract.

Dickey v. Winston Cigarette Co., 117 Ga. 131.

8. A warranty as to the capacity of a mill must be taken to be applicable to the mill when operated under favorable circumstances and conditions.

Fink v. Tank, 76 Am. Dec. 737, 12 Wis. 276.

9. The express warranty provides if there be any defects of workmanship or material other than minor adjustments that the lock shall be returned to the chief office at Indianapolis. That the defendant thought he could tinker on the locks and improve them, or that he thought it necessary to do additional work on them, or that it felt that the exigencies of its business did not give them time for such return, furnishes no legal excuse why this provision of the contract should not be fulfilled.

APPELLANT HAS PROVEN NO DAMAGES AND OFFERED NO COMPETENT OR SUFFICIENT EVIDENCE THEREOF.

1. In the first place it withdrew from the consideration of the court all alleged damages with respect to failure to get locks on time, stating frankly to the court that this sort of damages would enter into realms of speculation.

The defendant introduced in evidence a statement which the defendant's witnesses testified was a correct copy of a record showing the expenditures paid out for help outside the City of Los Angeles. (Tr., p 501.) From an examination of the witnesses it appeared, however, with respect to this exhibit that it included not only money paid out to labor in repairing and fixing locks, but also the amount paid out for the collection of money from the boxes and installing locks and doing all work necessary to represent the defendant. All this was over objection. (See Tr., p. 516, and following pages.) Mr. Newby informed the court before the ruling that he would follow this and show what was properly charged to the account. No other evidence was offered by him on this subject.

So, as the record now stands there is simply this evidence, the opinion of Crews, as to the amount of money expended by this company for salaries of men employed outside of Los Angeles. It appears from the testimony of D. L. Cosby (Tr., p. 600) that he kept the original books of the company of which Exhibit No. 12 purports to be a transcript. That in said books there was no segregation of the amount paid to men for repairs, hence the exhibit as it now stands in the record shows the total amount expended by the company for salaries of its employees in places outside the City of Los Angeles. Mr. H. J. Cosby testified that these men installed locks, made incidental repairs, and collected the nickels from the locks and sent them to the company. In other words they were the

representatives of the Pacific Coin Lock Company in these other cities. Surely it will not be contended by the defendant that the plaintiff should pay the men who represented them in these localities, soliciting new business for defendant and making collection of the nickels and settling with the hotels and the owners of the buildings where the locations were. The sums paid out on these matters were deducted as an expense account before the $32,000 net income for the years were made. We therefore assert, that this exhibit showing the total expenditures for salaries outside the City of Los Angeles does not and could not measure any damages to the defendant for work done on locks in making them as warranted, especially in the light of the contract which expressly provides that if the locks are defective in workmanship or material, that they shall be returned to the company at Indianapolis, Indiana, for repairs. The contract expressly also provides for any minor repairs to be made they shall be made by the defendant itself, and that was one of the obligations it assumed under the terms of its contract and for which it could not predicate damages against the plaintiff in this action.

It is true, of course, that Mr. Crews, who was an accountant in the office of the company and who claimed in his testimony to know but little about the lock business testified that it was necessary to keep a trouble shooter on the ground in the locations other than Los Angeles, but he merely stated his own conclusions and backed up by no testimony of any kind or character, so that his opinion could not be considered as testimony sufficient to warrant the court in holding that the expenditures made as shown by the exhibit were for necessary repairs made to the locks due to defects in material and workmanship. The contract requires the defendant to make minor repairs. Mr. Crews based his judgment that it would not have been necessary to keep men on salaries in cities outside of Los Angeles by what he claimed was the custom of other lock companies. The plaintiff could not be bound by the testimony of other lock companies in this respect, for other lock

companies, doubtless have different contracts for their customers.

2. The general measure of damages for a breach of warranty is the difference between the value of the article actually furnished and the value it would have had, had it possessed the warranted qualifications.

Willison, Vol. III, Sec. 1391.

3. The measure of damages for defect in cotton compressing machine purchased to use the ensuing year, is the rental value for the year.

Livermore, etc., v. Union Com., 53 L. R. A. 482.

4. The measure of damages for a breach of warranty of machinery not wholly worthless is the difference between the value of the property installed and its value as a warranted.

Hauss v. Surran, 168 Ky. 686, L. R. A. 1916D, 997.

5. The locks which the defendant received were admittedly not wholly worthless because it used them and made a large profit, the most, we assert, the defendant could claim for a breach of warranty would be the difference between what *it did make on said locks and what he would have made if they had been as warranted.* This could perhaps have been arrived at by evidence, by the making of proof of the rental value of the locks, if they had been as defendant claimed they should. There is no competent evidence in the record as to the defendant's damage, and even if it should be entitled to recover, which we strenuously deny, it would have to be as nominal damages.

English v. Spokane Com. Co., 57 Fed. 451.

APPELLANT'S SUB-DIVISION.

IV.

THE APPELLANT WAS CLEARLY JUSTIFIED IN DECLARING THE CONTRACT CANCELLED ON APRIL 23, 1923, ETC.

As heretofore pointed out in discussing Subdivision III that it covers the *entire case* and just why this additional subhead is made is not exactly clear. In discussing III we have answered about all the points raised under this division and any extended argument on the same subject matter here, would be only a work of supererogation, however, we do wish to point out that the testimony set out thereunder with respect to the profits appellant would have made, etc., are only mere conclusions not predicated on any facts in the case. There are numerous errors of facts alleged to have been proven which will be noted in comparing the record, which time and space forbid us to set out in detail.

APPELLANT'S SUB-DIVISION.

V.

DEFECTS IN FINDINGS.

1. The appellant is in error in assuming that the finding of court must be in harmony with the California Statutes by reason of the Conformity Act. This is regulated by U. S. C. Title 28, Par. 773, which provides that

> "The finding of the court upon the facts may be either general or special." It is within the discretion of the court in which way he shall find such facts.
>
> *Bank of Waterproof v. Fidelity and Deposit Co.*, 299 Fed. 480.

Since it is discretionary with the court as to how it may find the facts, it is not error if it finds such facts generally and not specially—if it makes a general finding it is enough that sufficient facts are found to sustain the judgment. There is no pretense that the lower court undertook to make a special finding of facts on all the issues involved—neither is this required by U. S. Code, but appellant has treated the subject as though a special finding of facts had been requested and made by the court. The court in its order does not denominate them *special finding* of facts. (See Tr., p. 34.)

Of course it would be admitted if the court undertook to make a special finding of facts on the issue involved it would be required to find all the pertinent facts shown by the evidence and embraced within the issues.

2. Most of the criticisms as to the court's findings are highly technical and several deal with the question as to whether they were within the issues, or sustained by the evidence. The latter propositions have been covered in other parts of the brief and will receive no further consideration here.

3. As to whether certain findings are findings of fact or "conclusions" sometimes require much subtle and refined reasoning. The appellant has answered its own argument on page 120 of its brief which we here quote with approval:

> "It is in many cases difficult to distinguish between findings of fact and conclusions of law; the ultimate facts are not in all cases found only from direct evidence, but are to a great extent presumed from the existence of other facts, or arrived at by an inferential process, in which the evidentiary facts become the premises and the ultimate fact the conclusion. In most cases the question is determined by a consideration of the means by which the result is obtained. If, it is said, from the evidence, the result can be reached by that process of reasoning adopted in the investigation

of truth, it becomes an ultimate fact, to be found as such. If, on the other hand, resort must be had to the artificial processes of the law in order to reach a final determination, the result is a conclusion of law. Any *doubt* as to the category in which the result reached by the court belongs is to be *resolved in favor of the judgment.*"

THE JUDGMENT WAS MORE FAVORABLE TO THE DEFENDANT THAN IT WAS ENTITLED UNDER THE LAW AND FACTS, HENCE THERE SHOULD BE NO REVERSAL.

The U. S. Judicial Code provides in effect that on the hearing of any appeal the court shall give judgment after an examination of the entire record, without regard to technical errors or defects which do not affect the substantial rights of the parties.

U. S. Judicial Code, Title 28, Sec. 391;
(Judicial Code 269 as amended.)

Section 398 provides that where review of judgments is sought by appeal or writ of error, the Appellate Court shall have full power to render such judgment on the record as law and justice may require.

Section 875, Title 28, Judicial Code, provides that no judgment, etc., shall be reversed for any defect or want of form, but shall proceed to give judgment according to the rights of the cause in law shall appear, etc.

With these salutory statutory provisions in mind we wish to show if we may, that the judgment in the court below was quite favorable to appellant, in fact, much more favorable than he was entitled by a consideration of the entire record, that appellee was entitled to judgment in addition to what it received, by virtue of the express language of the contract, to the value of all the sub-lease locations, and by reason of appellant

violating its contract and keeping such locations, that appellee was justly entitled to damages for what such locations were worth which in 1922 earned $32,000.00 net. It is true, appellee has not assigned cross-errors as it had the right to do, but if it chose to accept a lesser amount than it was entitled under the law, rather than have continued litigation, it insists that this court should consider its rights in determining whether *substantial justice* has been done to appellant, with this in mind and for this purpose alone we wish to present to this court the argument we made in the court below on the construction of the contract which forms the basis of appellee's action and the proper measure of damages, and we maintain that the only error committed in the lower court was against appellee for which appellant cannot complain.

MEASURE OF DAMAGES.

(1) A decision of this question involves an interpretation of the contract. At the trial the plaintiff contended that upon a breach of the contract the plaintiff was entitled to all lock locations, and the locks thereon and coins therein. That the contract by express terms gave this; that this was the intention of the parties and that the defendant had breached its contract in not assigning said lock leases to plaintiff, and that by keeping said locations the plaintiff's damages should be measured by the value of such location, or what they reasonably might be expected to net the holder during the life of the respective location leases. The defendant contended, as we understood, that it had the right to cancel the contract at any time, and all the plaintiff could demand was the rental for the six months' period and the return of the locks, and on the other hand, the court indicated that the rental value ($10.00) per year of the locks during the remainder of the life of the respective lease contracts might be found to be the measure of damage in the event the plaintiff was entitled to recover.

In the interpretation of a contract all its provisions should be considered, the situation of the parties, and the purposes they had in mind, as gleaned from the contract, considered as a whole, and as to the several parts; every word and every provision should be given weight and effect, unless they contravene some rule of law.

(2) The contract is peculiarly an agency contract; paragraph 2 of the contract gives the defendant "The exclusive agency for the State of California." If the plaintiff should make any contracts for the use of locks in the defendant's territory they shall inure to its benefit "during the life of this contract." (Contract, paragraph 2.) The contract provides, paragraph 3, "Lessee agrees to use diligence in an effort to sublease *said locks* in said territory * * * which sub-leases shall be on terms and contract form to be furnished by the company."

Paragraph 5 provides:

> "All sub-leases which the lessee shall secure, covering the sub-letting of said locks shall thereupon and thereby, and the same are hereby assigned to the company as a guarantee that the Lessee will faithfully carry out and abide by the terms of this contract."

It will be noted that the sub-leases to be taken, are for *"said locks."* It therefore follows that if the subleases are taken pursuant to the terms of the contract they were subleases for *plaintiff's locks*, and none other, and on a termination of the contract would be of no value except to plaintiff or some one handling its locks.

Paragraph 6 of the contract provides: "Lessee shall also forfeit and surrender to the company all interest in all subleases and locks leased thereunder and coins therein."

We maintain it was clearly the intention of the parties from a consideration of the above and other parts of the con-

tract considered as a whole, that defendant as a part consideration for its being given the exclusive agency of the State of California and the locks let on a small per annum basis, that the defendant should obtain the lease contracts for *plaintiff's locks*. Plaintiff would have had no interest in defendant securing lease contracts upon which defendant *could use locks other than plaintiff's*. This is why plaintiff obligated the defendant to use diligence in an effort "to sublease said locks in said territory," and to take the leases on forms furnished by it. It was unquestionably the intention of the parties that the lease locations should be for the *plaintiff's locks*. The defendant realized this and for the most part furnished the plaintiff copies of its subleases, each of which as shown by the evidence is for plaintiff's locks and none other.

Therefore, the subleases being for plaintiff's locks it was but natural that the contract should provide as it does in paragraph six that in the event plaintiff should declare the contract cancelled for default of defendant that defendant should "*surrender* to the company all interest in all subleases, etc." Not particularly as a matter of compensation as for a breach of the contract but because the lease locations were to go with the locks, having been taken exclusively for these locks. This provision being one of the obligations the defendant had assumed, the surrender of such locations would have followed a termination of the contract for any cause. Suppose, for instance, the contract had been cancelled on January 1, 1923, as the defendant had a right to do, what would then have become of these lease contracts made for the plaintiff's locks. They presumably had value only for *plaintiff's locks*. Would they not under a fair and reasonable interpretation have gone to plaintiff under the surrender clause in paragraph 6? Suppose again that these lease contracts taken for plaintiff's locks at the time of the breach were practically worthless, paying only about $5.00 per year, would not the defendant have tendered an assignment of all of them to plaintiff and asserted that the plaintiff was not damaged inasmuch as it had trans-

ferred to plaintiff all the contract called for, and all that was in contemplation of the parties, and defendant could have justified its position by the express language of the contracts and by the adjudicated cases.

(3) A further study of this contract since the trial has convinced us that one of the binding obligations of the defendant within the contemplation of the parties was, that upon a breach or *termination* of this contract all subleases should go to plaintiff and since there has been a breach in not assigning them on demand this is as much a breach of its obligation as its refusal to keep the locks, and the measure of plaintiff's damages for this particular breach is the value of said leases or the loss of profits that plaintiff could have made had the contract in this respect been performed. The defendant has erroneously treated these locations as though it had a contract giving it the exclusive right to install *any* kind of lock it chose, but the contract provided it was to use due diligence to get "subleases for said locks" (the plaintiff's locks) and the evidence discloses that said subleases expressly provide that they shall install "coin controlling locks which are now under its control," meaning plaintiff's locks.

(4) The parties have a right to stipulate the measure of damages when drawing the contract, and it will be enforceable if otherwise legal.

Monument Pottery Co. v. Imp. Coal Co., 2nd Series Fed. Vol. 21, p. 683;

Monroe v. Hicks, 144 Mich. 30, 107 N. W. 719.

(5) Parties may stipulate the consequences of a breach of the terms of their contract, or provide the extent of their liability and the court will hold them to the contract.

Ancrum v. Conder Water Co., 21 L. R. A. (N. S.) 1029-1033.

There is no inhibition in the law against parties making an agreement disposing of personal property where such provision does not amount to a penalty, which public policy denounces, but we respectfully insist that the provisions of paragraph 7 do not call for a penalty, but are simply some of the obligations assumed and agreed to by defendant in consideration of its exclusive agency and privilege conferred upon it whereby it could, for a nominal investment, enter a business which would and did prove to be exceedingly lucrative.

> "Where parties agree upon a rule of damages to be followed in case of a breach of an agreement, it will be enforced."

Twin City Creamery Co. v. Godfrey, 176 Mich. 109, 50 L. R. A. (N. S.) 807.

(6) Damages recoverable on a breach of a contract are such as may reasonably be considered as arising naturally from the breach itself, or such as may reasonably be supposed to have been in contemplation of the parties when they wrote the contract.

Hunt v. Oregon Pac. Ry., 36 Fed. 481;
Taylor Mfg. Company v. Hatcher Mfg. Co., 39(Fed. 440;

Wilcox v. Richmond, etc., Ry. Co., 52 Fed. 264;
Wells v. Natl. Life Ins. Co., 99 Fed. 222;

Globe Refining Co. v. Landa Oil Co., 190 U. S. 540.

(7) The second paragraph of the contract provides that the lock rental shall be fixed per annum, payable however on the first days of January and July of each year, and that the succeeding payments shall be made annually thereafter. The

contract also provides that it is to continue in existence so long as the rentals are paid as herein specified. The third paragraph of the contract provides that it shall be automatically renewed from year to year on terms and conditions herein specified. It is therefore clearly apparent that the parties understood and agreed that the contract between them should be an annual affair and when renewed should be renewed for another year, and should therefore continue from year to year so long as rentals are paid. It follows, we think, that a failure to pay rentals at the beginning of any one year would amount to a cancellation of the contract. It would be a default in the payment, the effect of which would be to terminate the contract, which was seemingly within the contemplation of the parties. The latter part of paragraph seven provides in express language the following: "But the failure of the company to demand or take possession of said locks on account of any *default,* shall not estop it from afterwards taking possession of said locks on account of any subsequent default." We maintain that by the use of the word "default" as provided in paragraph seven that a failure to pay rental according to the terms of the contract would be such a default as would cancel the contract at the option of the plaintiff.

Paragraph seven provides that upon such default the lessee shall forfeit and *surrender* to the company all leases, and sub-leases and locks leased thereunder and coins therein. We, therefore, conclude that it is but fair to assume that the parties were undertaking to reach an agreement as to what should happen in the event of the cancellation of the contract which of course could be done by default in the payment of rent. It is true that the language is not quite as clear and as explicit as we would have it, but this is the only paragraph of the contract which seems to indicate anything with respect as to what the parties had in mind in the event of a cancellation of the contract at the end of any particular year. It follows, therefore, that if, upon a cancellation of the contract,

that sub-leases and locks thereon should go to the plaintiff that the same results should follow in the case of a breach which terminated the contract. We cannot see that it makes any difference how the contract was terminated whether by a breach of the defendant by repudiation and failure to carry on or whether by failure or default to make the annual payments of rental. The situation after the contract was terminated would be the same in any event, and the question with which we are dealing, is, what was to become of the sub-leases? It cannot be said with any degree of reason that the parties contemplated that in the event of termination or breach that the locks of the plaintiff could be taken off the location and shipped back to the plaintiff, and that the defendant should hold the location and install thereon other locks. This would do violence to every part and the whole of the contract, and this theory, we assert, cannot be sustained from any language of the contract. Considering the contract in individual parts which deal with the question of location, or considering it as a whole, all the sub-leases were to go to the plaintiff.

Referring here to the language of Justice Holmes in *Globe Refining Co. v. Landa Oil Refining Co., supra,* in which he says it is true if people when in contracting "contemplate performance not a breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rule has been worked out by common sense which establishes what the parties would have said if they had spoken about the matter." Here the parties have spoken in clear, distinct, and definite language; have contemplated the effect of a breach and what was to be done with the subject matter of the contract in the event of a breach occurring. They made a binding contract and acted upon the terms thereof for a period of seven years. It is true, the evidence shows, the president of the company says it was a hard bargain, or that the contract was too strong, but they executed it nevertheless, and acted under it. The contract was made by men

of sound minds, not acting under any duress, and is, in our opinion, in all respects valid and binding.

Mr. Justice Holmes expressed the rule very forcibly in the case of *Globe Refining Company v. Landa Cotton Oil Company, supra,* as follows:

> "When a man makes a contract, he incurs, by force of the law, a liability to damages, unless a certain promised event comes to pass. But, unlike *the* case of torts, as the contract is, by mutual consent, the parties themselves, expressly by implication, fix the rule by which the damages are to be measured."
>
> And again:
>
> "It is true that, as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man can never be absolutely certain of performing any contract when the time of performance arrives, and in many cases, he obviously is taking the risk of an event which is wholly, or to an appreciable extent, beyond his control. The extent of liability in such cases is likely to be within his contemplation and whether it is or not should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind."

In the case at bar the parties themselves did have in mind and did contemplate what might happen upon a breach of the contract, and did, by express terms of the contract, clearly set out in what manner, at least a portion of the damages should be measured. In other words the parties by the express terms of the contract have agreed on what disposition should be made of the subject matter about which they have contracted. The parties by their own agreement

fixed and determined in their language what should be done with the lock upon a breach of the contract, and they likewise, by the same agreement, and in the same language fixed and determined what should become of the lock locations *upon such* breach, namely, that the locks were to stay on the location and both locks and locations be delivered to the plaintiff upon demand.

Again in the *Globe Refining Company v. Landa Oil Company, supra,* Justice Holmes says:

> "The consequences must be contemplated at the time of the making of the contract. The question arises then, what is sufficient to show that the consequences were in contemplation of the parties, in the sense of the vender taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing. 'It may be asked with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without going to show that he was told that he would be answerable for them and consented to undertake such a liability."

In the case from which we have been quoting the plaintiff was undertaking to hold the defendant for certain damages growing out of the breach of a contract, claiming that such damages were the natural consequences and result of the breach, and were such damages as might have been in contemplation of the parties at the time of making the contract, namely, that the plaintiff would, of necessity, have to go to the expense of sending tank cars a long distance in order to receive the oil contracted for, and the plaintiff further claimed that the defendant had notice that such cars would have to be transported such distance, but the court disposed of this question as indicated by the above quotation by saying that mere notice was not sufficient, but it must be apparent that the liability to be incurred was clearly within

the contemplation of the parties at the time the contract was made.

The question of the sub-leases was not only within the contemplation of the parties, but likewise was the subject of an express provision, and it was therefore well understood by both parties that upon a breach of the contract that these locations and locks should go to the plaintiff.

In *Wells v. National Life Association,* 99 Federal 229, the court quoted from the case of *Dennis v. Maxfield,* 10 Allen 138, as follows:

> "These earnings or profits were therefore within the direct contemplation of the parties when the contract was entered into. They are undoubtedly in their nature contingent and speculative and difficult of ascertainment, but, being made by express agreement of the parties of the essence of the contract, we do not see how they can be excluded in ascertaining the compensation to which the plaintiff is entitled, etc."

The claim was made in that case that the measure of damages was speculative and inadequate, and that it did not constitute a safe basis on which to rest a claim for indemnity. The court said:

> "The answer is that in such cases the parties having by their contract adopted a contingent, uncertain and speculative measure of damages, must abide by it, and courts and juries must approximate as near as possible to the truth in endeavoring to ascertain the amount which the party may be entitled to recover on such a contract in the event of a breach."

And in *Wells v. National Life Association,* the court also quoted from *Wakeman v. Manufacturing Co.,* 101 N. Y. 205, among other things as follows:

> "Most contracts are entered into with the view to future profits, and such profits are in the contem-

> plation of the parties, and, so far as they can be properly proved, they may form the measure of damages. As they are prospective they must be to some extent uncertain and problematical, and yet, on that account a person complaining of a breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach and the consequences naturally and plainly traceable to it; and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach. When a contract is repudiated, the compensation of the party complaining of its repudiation should be the value of the contract. He has been deprived of his contract, and he should have in lieu thereof its value, to be ascertained by the rules of law which have been laid down for the guidance of courts and jurors."

We earnestly maintain that under the contract the locks and locations should have been turned over to plaintiff, and the failure to do so entitled the plaintiff to what such locations would have earned during the life of such sub-leases. The evidence shows that this was $32,000 per year for the year 1921, and the court suggested when an offer was made to prove the earnings for the year 1922, that if the court should conclude that the plaintiff was entitled to recover such profits, the case would be opened and the defendant directed to supply such evidence. The average life the contracts outstanding at the time of the breach of the same is two and one-half years, and at $32,000.00 per year, would have earned net to the plaintiff the gross sum of $95,000.00.

8. Should the court, however, conclude that a fair interpretation of the contract would not give to the plaintiff the lock location, then we maintain that the measure of plaintiff's damages should be the rental of locks contracted for during the life of the several sub-lease contracts, and these is strong authority for this contention as shown by the following:

"It is the general purpose of the law, and should be, to give *compensation*; that is, to put the plaintiff in as good a position as he would have been had the defendant kept his contract."

Williston on Contracts, Vol. III, Sec. 1338.

"Compensation should not be for the value of the contract, but the value of *performance* of the contract, it is performance that the parties are entitled to."

Williston on Contracts, Section 1339.

We maintain that we have answered all and, even more of the specifications of error that are properly presented in appellant's brief. It has been quite difficult in analyzing its brief to know definitely to just what "specification of error" some of its argument was intended to apply.

For any illogical arrangement in the assembling of the argument we desire to pass the blame to appellant because we have tried to follow its order of presenting the subjects.

We insist that no error appears from the record and that the decision and judgment of the court below were clearly right on the record and that substantial justice has been done appellant, and that this cause be in all things affirmed.

Respectfully submitted,

CLYDE H. JONES,
D. M. PATRICK,
Attorneys for Appellee

1314 Merchants Bank Bldg.,
Indianapolis, Indiana.

"EXHIBIT A"

Indianapolis, Ind., February 23, 1915.

THIS CONTRACT between COIN CONTROLLING LOCK COMPANY, a corporation with its main offices at Indianapolis, Indiana, designated as "COMPANY" and CHARLES C. GARRISON, of Los Angeles, California, designated as "LESSEE," WITNESSETH:

(1) In consideration of the payment of an annual rental of ten ($10.00) per lock, payable as follows: Five hundred ($500.00) dollars payable January 1st, 1915, and five hundred ($500.00) dollars July 1st, 1915, or within sixty days from said dates by grace and annually thereafter, the Company hereby leases to the Lessee, for a period as long as rentals are paid as herein specified, one hundred (100) Coin Controlled Locks owned by it, and covered by sundry United States and foreign Letters Patent, for exclusive use in the following territory and none other, to-wit:

THE EXCLUSIVE AGENCY FOR THE STATE OF CALIFORNIA.

(2) It is further understood and agreed that any and all Coin Locks that may be contracted for use by the parent Company or its agents nor or in the future in the State of California will inure to the benefit of the said Lessee during the life of this contract, which is automatically renewable from year to year, on terms and conditions herein specified.

(3) The Company agrees to lease additional locks to the said Lessee for his exclusive use in said territory and subject to all the terms hereof, as needed, rental for which shall be payable at the times as above specified, viz., January 1st and July 1st of each year following date of shipment, rentals to be computed proportionately from the first day of the month following date of shipment. Lessee agrees to use diligence in an effort to sub-lease said locks in said territory for use in hotels, railroad stations and other public places, which sub-leases which shall be on terms and contract forms to be furnished by the Company, and shall immediately notify the Company of the exact location of each lock so installed,

and the name of the owner or lessee of the building, where installed, and shall furnish the Company a copy of the contract under which it is installed. He shall notify the Company of all renewals, removals and locations of the locks and is granted the further privilege of maintaining ten (10) additional locks without charge for repairing and replacements.

(4) The Company guarantees its locks as to material and workmanship and agrees to keep them in proper repair, except as to minor defects and repair or replace free of charge any lock that is defective, provided that the Lock be returned to the Company at its main office.

(5) All sub-leases which the Lessee shall secure, covering the sub-letting of said locks shall thereupon and thereby, and the same are hereby assigned to the Company as a guarantee that the Lessee will faithfully carry out and abide by the terms of this contract.

(6) On violation of any of the terms hereof, and on demand therefor, Lessee shall surrender to the Company his lease title to said locks, but he is not to remove them from position as already installed, without the written consent of the Company, and all locks in possession of Lessee that are not installed to be delivered to the Home Office of the Company. All locks to be in as good condition as when received by Lessee, except natural depreciation, wear and tear; Lessee shall also forfeit and surrender to the Company all interest in all sub-leases and locks leased thereunder and coins therein, but the failure of the Company to demand or take possession of said locks on account of any default shall not stop it from afterwards taking possession of said locks on account of any such subsequent default.

(7) The title to said locks, and all parts thereof, shall remain at all times in the Company, and the Lessee shall not convey or encumber the same, or use or maintain toilet locks or other Coin Controlled Locks other than those of the Company, without the written consent of the Company.

(8) It is hereby further fully understood and agreed that the Company will grant the Lessee the privilege of first refusal to operate exclusively in the State of California any and all new device or devices which it may acquire by owner-

ship or lease, now or in the future and under the same terms and conditions which are operative with other similar representatives in other states and territories.

(9) Violation of any of the terms hereof shall thereby work a forfeiture of this contract, and any and all funds then in or thereafter deposited in any and all locks secured under this contract shall be and remain the absolute property of the Company, not as a penalty, but as liquidated damages suffered by it for such violation of this contract.

(10) IN TESTIMONY WHEREOF the Coin Controlling Lock Company has caused this contract to be executed by its proper officer, and the Lessee has hereunto set his hand and seal, all in duplicate this 23d day of February, 1915.

COIN CONTROLLING LOCK COMPANY,

By FRANK R. MALSBURY, *Secretary-Treasurer.*

CHARLES C. GARRISON, *Lessee.* (SEAL)

Witness to signature of Charles C. Garrison,

C. E. Miller, 608 Grosse Bldg., Los Angeles, Cal.

EXHIBIT A-1

ASSIGNMENT OF CONTRACT

Los Angeles, California, February, 1915.

For and in consideration of three thousand ($3,000.00) dollars, the receipt of which is hereby acknowledge, and other valuable considerations, I, the undersigned, Charles C. Garrison of Los Angeles, California, hereby assign, sell and transfer all of my rights, title and interest in a certain contract under date of February 23, 1915, by and between the Coin Controlling Lock Co. of Indianapolis (a corporation) and the undersigned, Charles C. Garrison to Pacific Coin Lock Company (a corporation) of Los Angeles, California.

CHARLES C. GARRISON.

CONSENT

For and in consideration of the execution of a new contract by and between Charles C. Garrison, of Los Angeles, California, and the Coin Controlling Lock Company, of Indianapolis, Indiana, said contract bearing date as of February 23, 1915, and taking effect as of January 1, 1915, by mutual consent, and three thousand ($3,000.00) dollars cash to be paid by said Garrison on or before March 15, 1915, to said Coin Controlling Lock Company, which is in full payment of all accounts to said Company up to Juanary 1, 1915, hereby gives its consent to the execution of the above assignment on the conditions recited herein.

COIN CONTROLLING LOCK COMPANY,

(SEAL) *By* FRANK R. MALSBURY, *Secretary-Treasurer.*"

No. 5659

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

KITTY JACKSON, HILDA J. FOSTER and HILDA J. FOSTER, as Administratrix of the Estate of JACK JACKSON, Sometimes Called TRINIDAD JACK, Deceased,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

FILED
JAN 15 1929
PAUL P. O'BRIEN,
CLERK

The Filmer Bros. Electrotype Co., San Francisco—1—7—29—50

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Attorneys for Appellant:

GEO. J. HATFIELD, Esq., U. S. Attorney, San Francisco, Cal.,

ALBERT E. SHEETS, Esq., Asst. U. S. Attorney, Sacramento, Calif.

Attorney for Appellee:

W. ERNEST DICKSON, Esq., Eureka, Calif.

In the Northern Division of the United States District Court, for the Northern District of California.

UNITED STATES OF AMERICA,

Plaintiff.

vs.

KITTY JACKSON, HILDA J. FOSTER, and HILDA J. FOSTER, as the Administratrix of the Estate of JACK JACKSON (Sometimes Called TRINIDAD JACK), Deceased.

Defendants.

JUDGMENT BY THE COURT.

This cause came on regularly for trial and was tried at a term of this court, before the Hon. Frank H. Kerrigan, sitting as a Court of Equity

without a jury, at Eureka, California, on the 16th day of July, 1928; George J. Hatfield, U. S. Attorney for the Northern District of California, Northern District, appearing for plaintiff and W. Ernest Dickson, of Eureka, appearing for defendants.

Upon motion of attorney for plaintiff, it was ordered that Hilda J. Foster, as administratrix of the estate of Jack Jackson (sometimes called Trinidad Jack), deceased, be made a party defendant in addition to Hilda J. Foster and Kitty Jackson.

Whereupon evidence both documentary and oral was introduced by both plaintiff and defendants, and the evidence being closed, the cause was submitted to the Court for its decision.

And the Court being fully advised in the premises, after due deliberation files its findings and decision in writing and orders that judgment be entered herein in favor of defendants in accordance therewith:

WHEREFORE by reason of the law and findings as aforesaid IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Kitty Jackson, Hilda J. Foster, and the Estate of Jack Jackson (sometimes called Trinidad Jack), deceased, are the owners in fee and [1*] entitled to the possession of the land and premises in plaintiff's complaint and hereinafter described, and that neither the United States of America nor Bob

*Page-number appearing at the foot of page of original certified Transcript of Record.

Roberts, an Indian ward of the United States of America, has any estate, right, title or interest therein.

The land and premises herein referred to are situated in the county of Humboldt, State of California, and are more particularly described as follows:

South half of Southwest quarter of Section twenty (20) and the Northeast quarter of the Northwest quarter of Section 29 in Township 11 North, Range 3 East, Humboldt Meridian, containing 120 acres according to the United States Survey.

Done in open court this 6th day of Sept., 1928.

FRANK H. KERRIGAN,

Judge of U. S. District Court, Northern District of California, Northern Division.

[Endorsed]: Filed and entered Sep. 6, 1928. [2]

[Title of Court and Cause.]

AGREED STATEMENT.

(Under Equity Rule 77.)

The questions arose and were decided in the District Court as appears in the opinion of the District Judge reported, 27 F. (2d) 751, which opinion is here incorporated as though copied fully herein and is adopted as an agreed statement under Equity Rule 77; and it is agreed that the said opinion sets forth so much of the facts

alleged and proved as is essential to a decision by the Appellate Court of the questions that arose and were decided in the District Court. It is stipulated that the said opinion may be read in said report, 27 F. (2d) 751, with the same effect as though copied and certified in the transcript of record.

GEO. J. HATFIELD,
United States Attorney,
ALBERT E. SHEETS,
Asst. United States Attorney,
Attorneys for Plaintiff and Appellant.
W. ERNEST DICKSON,
Atty. for Respondent.

Approved.

FRANK H. KERRIGAN,
Judge.

[Endorsed]: Filed Dec. 4, 1928. [3]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL, ASSIGNMENT OF ERRORS, PRAYER FOR REVERSAL, AND ORDER ALLOWING APPEAL.

PETITION.

Considering itself aggrieved by the final decision and decree of the United States District Court for the Northern Division of the Northern Dis-

trict of California in the above-entitled cause, the plaintiff therein, United States of America, hereby prays that an appeal may be allowed in its behalf to the Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors made in said cause to the prejudice of this plaintiff, as more fully appears from the following:

ASSIGNMENT OF ERRORS.

The said plaintiff assigns the following errors in the record and proceedings in the said case:

1. The said District Court erred in ruling that Jack Williams was not an "allottee" within the meaning of that term as used in the Act of June 21, 1906 (34 Stat., pp. 325, 326. U. S. C., tit. 25, § 391).

2. The said District Court erred in concluding and deciding, upon the basis of said ruling, that said plaintiff was not [4] entitled to any relief in said cause.

3. The said District Court erred in concluding and deciding, upon the basis of said ruling, that the title claimed by the defendants and cross-complainants in said cause should be adjudged good and quieted against said plaintiff.

4. The said District Court erred in concluding and deciding, upon the basis of said ruling, that the title claimed by said plaintiff in said cause should not be quieted against said defendants and cross-complainants.

PRAYER FOR REVERSAL.

For which errors the said plaintiff, United States of America, prays that the said final decision and decree of the said District Court entered on the 3d day of September, 1928, in said cause be reversed and a judgment rendered in favor of said plaintiff and for costs.

GEO. J. HATFIELD.
GEO. J. HATFIELD,
United States Attorney,
ALBERT E. SHEETS.
ALBERT E. SHEETS,
Asst. United States Attorney,
Attorneys for Said Plaintiff and Appellant.

ORDER ALLOWING APPEAL.

IT IS ORDERED that the appeal petitioned for in the foregoing petition be and the same is hereby allowed and it is ordered further that the plaintiff and appellant therein shall not be required to give any security upon said appeal.

Dated: November 28th, 1928.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Nov. 28, 1928. [5]

[Title of Court and Cause.]

AFFIDAVIT OF MAILING PRAECIPE FOR TRANSCRIPT OF RECORD.

United States of America,
Northern District of California,
County of Sacramento,—ss.

Zula G. Davenport, being duly sworn, says that she is over the age of eighteen, and is not a party to the above-entitled action.

That on the 4th day of December, 1928, she, the said affiant, deposited in the United States postoffice at the city of Sacramento, county of Sacramento, State of California, a copy of the praecipe to the Clerk of the above-entitled court to issue a transcript of the record in this cause to be filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, etc., enclosed in a sealed, franked envelope, directed to

W. Ernest Dickson, Esq.,
Attorney at Law,
First National Bank Bldg.,
Eureka, California,

the attorney for the said defendants; and that there is a regular communication by the United States mails from said postoffice of deposit thereof, as aforesaid, to the place of residence of said defendants' attorney.

[Seal] ZULA G. DAVENPORT.

Subscribed and sworn to before me this 4th day of December, 1928.

[Seal] F. M. LAMPERT,

Deputy Clerk, U. S. District Court, Northern District of California. [6]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of Said Court:

Sir: Please issue a transcript of the record in this cause to be filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, in connection with the appeal heretofore taken and perfected to said court, and include in said transcript the following papers:

1. The final decree, with date of entry endorsed thereon.
2. Agreed statement.
3. .....
4. .....
5. .....
6. Petition for allowance of appeal, assignment of errors, prayer for reversal, and order allowing appeal.
7. Citation on appeal with proof of service.
8. This praecipe.

GEO. J. HATFIELD,
ALBERT E. SHEETS,
Attorneys for Plaintiff and Appellant.

[Endorsed]: Filed Dec. 4, 1928. [7]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing ——— pages, numbered from 1 to ———, inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of United States vs. Kitty Jackson, et al., Eq. No. 245, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal, copy of which is embodied herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court this 14th day of December, A. D. 1928.

[Seal] WALTER B. MALING,
Clerk.
By F. M. Lampert,
Deputy Clerk. [8]

[Title of Court and Cause.]

AFFIDAVIT OF MAILING CITATION ON APPEAL.

United States of America,
Northern District of California,
County of Sacramento,—ss.

Zula G. Davenport, being duly sworn, says that she is over the age of eighteen, and is not a party to the above-entitled action.

That on the 4th day of December, 1928, she, the said affiant, deposited in the United States postoffice at the city of Sacramento, county of Sacramento, State of California, a copy of the citation on appeal in the above-entitled action, enclosed in a sealed, franked envelope, directed to

W. Ernest Dickson, Esq.,
Attorney at Law,
First National Bank Bldg.,
Eureka, California,

the attorney for the said defendants; and that there is a regular communication by the United States mails from said postoffice of deposit thereof, as aforesaid, to the place of residence of said defendants' attorney.

ZULA G. DAVENPORT.

Subscribed and sworn to before me this 4th day of December, 1928.

[Seal] F. M. LAMPERT,
Deputy Clerk, U. S. District Court, Northern District of California. [9]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to Kitty Jackson, Hilda J. Foster, Hilda J. Foster as Administratrix of the Estate of Jack Jackson, Sometimes Called Trinidad Jack, Deceased, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern Division, Northern District of California, wherein the United States of America is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern Division of the Northern District of California, this 3d day of December, A. D. 1928.

FRANK H. KERRIGAN,
United States District Judge.

Citation on Appeal. Filed Dec. 4, 1928. [10]

[Endorsed]: No. 5659. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Kitty Jackson, Hilda J. Foster, and Hilda J. Foster, as Administratrix of the Estate of Jack Jackson, Sometimes Called Trinidad Jack, Deceased, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed December 17, 1928.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5659

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff and Appellant,

vs.

JACKSON ET AL.,
Defendant and Respondent.

BRIEF FOR APPELLANT

GEORGE J. HATFIELD,
United States Attorney.

ALBERT E. SHEETS,
Asst. United States Attorney.

FILED
JAN 15 1929
PAUL P. O'BRIEN,
CLERK

Neal, Stratford & Kerr, S. F.

5659

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff and Appellant,

vs.

JACKSON ET AL.,
Defendant and Respondent.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE.

This case was an appeal from a judgment of the District Court of the Northern District of California rendered by his Honor United States District Judge Frank H. Kerrigan, for the defendants and cross-complainants in an action to quiet title brought by plaintiff on behalf of an Indian, its ward, and comes here on an agreed statement under Equity Rule 77, by the stipulation of which the opinion of Judge Kerrigan (Appendix A) is made the agreed facts.

This action was brought to cancel a deed conveying certain lands in Humboldt County, California, which were entered by and patented to one Jack Williams, a

tribal Indian, as a homestead under the provisions of Title 43, Section 190, U. S. Code, Act of July 4, 1884, 23 Stat. 96, reading as follows:

> "That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land officers, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, by his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatso ever."

The patent which was issued in conformity with the above provisions was dated December 11, 1891, and contained in specific terms, a declaration to the effect that the United States would hold the lands for the period of tweny-five years in trust for the sole use and benefit of said Jack Williams, or in case of his death, of his widow and heirs, and that at the expiration of said period the United States would convey said lands by patent to him, or his widow or heirs, in fee, dis-

charged of said trust and free of all charges or incumbrances whatsoever.

As the trust thus declared would terminate December 11, 1916, it is argued that at the time when the deed in question was executed, March 18, 1921, the grantor herein, the widow and sole heir of said Jack Williams who had died prior to the termination of the trust, was entitled, under the law, to have the said lands conveyed to her, in fee, discharged of the trust, and she could therefore alienate the same, with the result that although no such patent in fee was ever issued to her, her conveyance to Jack Jackson, from whom the defendants herein derive their title to said lands, must be held to be good.

It is contended by the Government, however, that no such result came about because the period of the trust was continued by a series of Executive Orders making one-year extensions from 1916 to 1919, inclusive, and a further extension in 1920 for a period of twenty-five years. Authority for the issuance of these Executive Orders is claimed under the following provisions of the Act of June 21, 1906, 34 Stat. 325-326, Title 25, Section 391, U. S. Code:

> "That prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best."

The question which arises here is as to the applicability of these statutory provisions to lands entered

and patented as a homestead under the provisions of the Act of 1884, *supra.*

The trial court in deciding the question adversely to the Government held that such provisions are limited to Indian allottees and can not apply to Indian homesteaders; that the Executive Orders purporting to extend the period of restrictions, as far as the Act of 1884 is concerned, are without effect, and consequently, they can not affect the validity of the said deed. Other questions involved in the case and dealt with by the court in its memorandum opinion are not disputed here and will not, therefore, be considered. Copy of the memorandum opinion will be found at Appendix A.

There is no previous decision by the courts bearing directly upon the question presented in this case. The case of Seaples v. Card, 246 Fed. 501, cited by Judge Kerrigan in support of his decision is not in point. In that case the question decided by the court was as to the authority of the Secretary of the Interior under the Act of May 8, 1906, 34 Stat. 183, amendatory of Section 6 of the General Allotment Act of 1887, 24 Stat. 388, to cancel patents issued to Indians under the Act of March 3, 1875, 18 Stat. 420, or the Act of 1884, *supra.* It was therefore in reference to that question that the Court in the Seaples Case said, at page 506:

> "This act is by its terms limited to Indian allottees and confers no authority upon the Secretary of the Interior to cancel patents issued under the act of 1875 or the act of 1884. Why the Secretary of the Interior should be authorized to remove the restriction on alienation in the case of

> Indian allottees, and not of Indian homesteaders, under the acts of 1875 and 1884, I do not know, and am not at liberty to inquire. Suffice it to say that Congress has spoken, and has granted the authority in the one case, but not in the other. If I am correct in these conclusions, the order cancelling the trust patent was erroneous."

Conceding that the word "allotment" is not a term of sale or grant as the word "homestead" would seem to be, but a term of apportionment of that to which the allottee was originally entitled as a matter of right, Parr et al. v. United States et al., 153 Fed. 462, and conceding further that the word "allottee" would not necessarily include an Indian homesteader, still the decision of the trial court in this case is unsound; for the question here is not as to the strict meaning of the words employed in the act, but as to the real intention of Congress in the use of the same.

It is unquestioned that in the construction of statutes the intent of the law makers must be found in the statutes themselves, the presumption being that language has been employed with sufficient precision to disclose the intent. But when, as in this case, the particular word used in the statute has been also employed by the law makers in other legislation of the same character to designate a different class of persons than those to which the statutory provision in question would seem to refer in the ordinary meaning of such word, the courts enforce the statute as intended instead of, as written. For this purpose it is a familiar principle that the courts have power and will in suitable cases examine legislation *in pari materia* in order

to determine the real intention of the statute in question.

Tiger v. Western Investment Co., 221 U. S. 286, 305;
United States v. Freeman, 3 How. 556;
United States v. Hemmer, 195 Fed. 790, 806.

As was aptly observed in the case of Jim Crow, 32 L. D. 658, 659, the Act of 1884, *supra,* was soon thereafter followed by the General Allotment Act of 1887, *supra,* which after providing in Section 1 for allotments of lands upon Indian Reservations, declared in Section 4 that any Indian not residing upon a reservation who shall make settlement upon lands of the United States may have the same allotted to him and his children in quantities and manner prescribed for Indians residing upon reservations, the provisions in the Act of 1887 as to the form, effect and conditions of patents to be issued being the same as those in the Act of 1884. The General Allotment Act, so far as it affects public lands, and the preceding provisions of the Act of 1884 regarding Indian homesteads are so clearly connected that they should be construed in *pari materia* as relating to the same subject matter, the purpose of the later allotment act evidently being to carry forward the policy of the former enactments to give Indians a right to secure homes upon the public domain.

That Congress has recognized that Indian allotments are of the same nature as Indian homesteads is clearly evident from various acts relating to matters more or less connected with the subject. See act of

March 3, 1891, 26 Stat. 989, 1007; Act of June 25, 1910, 36 Stat. 855, and act of February 8, 1887, *supra*. It is significant that in the last mentioned act, which is the General Allotment Act, Congress indiscriminately uses the word "allottee" to designate the Indians who are to be allotted upon Indian Reservations under Section 1, and the Indians who are to be granted homesteads upon lands of the United States under Section 4, referring to the latter as *allotted* Indians while in the act of 1891, it characterizes claims under the General Allotment Act as homesteads. It would seem, therefore, that claims under the various laws relating to Indian homesteads may with propriety be characterized as allotments, and an Indian homesteader as an allottee, the difference, if any, between the two terms merely relating to the original character of the lands upon which the allotment is made. So far as the laws in which they are found affect the public lands, and so far as the interests of the Indian claimants are concerned, it may be truly said that the two terms practically mean the same thing.

That Congress has ample power to extend the period of limitation upon the power of alienation of Indian homesteads does not seem to have been questioned by Judge Kerrigan. This power, however, can not be doubted in view of the decision in the Tiger Case, *supra*, which although relating to allotments, applies with equal force to a case like this. As stated in the case of United States v. Hemmer, 195 Fed. 790, which involved a question under the Indian homestead act,

> "Congress has the power to determine when the guardianship which is maintained over the Indians

shall cease, and may extend the period of limitation on the alienation of lands by an Indian at any time before the issuance to him of final patent."

That the Interior Department has complete jurisdiction over the public lands until title passes has never been doubted nor denied. See United States v. Hemmer, *supra.*

On the other hand, it is of great importance to observe, that as stated in the case of Toss Weaxta, 47 L. D. 574, 579, the Interior Department has all along treated Indian homesteads upon practically the same footing as Indian allotments, and as equally coming within the purview of the statutory provision here in question, considering for purpose of *pari materia* laws, the condition and standing of the Indians, and the obligations of the Government toward them.

See also

26 L. D. 34;
32 L. D. 657;
32 L. D. 291;
37 L. D. 291.

Even though the question presented in this case is said to be a doubtful one, when the meaning of a statute is doubtful, the construction given by the Department charged with its execution should be given controlling weight.

United States v. Cerecedo Hermanos y Compania, 209 U. S. 337;

Robertson v. Downing, 137 U. S. 607;

United States v. Healy, 160 U. S. 136.

And a settled construction by a Department of the United States of the laws of the United States will not be overturned by the courts unless such construction is clearly wrong.

United States v. Hemmer, supra;
United States v. Healy, supra;
Hewitt v. Schultz, 180 U. S. 139;
United States v. Finell, 185 U. S. 236.

The courts have invariably declined to disregard or over-rule the construction placed upon statutes by the Executive Department charged with their administration "except for cogent reasons and unless it is clear that such construction is erroneous", (United States v. Johnston, 124 U. S. 236, 253), or, "unless a different one is plainly required" (Hawley v. Diller, 178 U. S. 476, 488). The Supreme Court, in speaking of a long continued practice of the Interior Department, said:

> "Its (Congress') silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress."

United States v. Midwest Oil Co., 236 U. S. 459, 481.

Futhermore, the statute should be construed in the light of its obvious policy to protect the Indian against their own improvidence in the matter of disposing of their lands.

Levindale Lead and Zinc Mining Co. v. Coleman, 241 U. S. 433

This policy the trial court entirely overlooked.

WHEREFORE it is submitted that the counter claim of the defendant should have been dismissed and title to the premises in question quieted in the plaintiff on behalf of Bob Roberts, a tribal Indian, its ward, since no power of alienation had theretofore existed in anyone with respect to said premises.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney.

ALBERT E. SHEETS,
Asst. United States Attorney.

APPENDIX A

UNITED STATES v. JACKSON ET AL.,

District Court, N. D. California, N. D.
July 31, 1928.

No. 245

27F. (d) 751

KERRIGAN, District Judge. This is an action to quiet title to certain lands, brought by the United States on behalf of Bob Roberts, a tribal Indian. A trust patent to the lands in question was issued to Jack Williams, also an Indian, December 11, 1891, in accordance with the act of July 4, 1884, c. 180, Sec. 1 (25 Stat. 96; USCA tit. 43, Sec. 190). This patent, in conformity with the statute, declared:

> "Now know ye, that the United States of America, in consideration of the premises and in accordance with the provisions of the said Act of Congress of July 4, 1884, hereby declare that it does and will hold the land described above for the period of twenty-five years in trust for the sole use and benefit of the said Jack Williams, or, in case of his decease, of his widow and heirs according to the laws of the state where such land is located, and at the expiration of said period the United States will convey the same by patent to the said Jack Williams, or his widow or heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

The trust thus declared would terminate December 11, 1916. Jack Williams died January 24, 1916, and the land passed to Nellie Williams, an Indian woman, his widow and sole heir. March 18, 1921, she executed the deed to Jack Jackson, also an Indian, which is the deed sought to be attacked in this action. This deed was recorded November 3, 1922. It was not, and never has been, approved by the Secretary of the Interior.

Nellie Williams died October 10, 1922, leaving a will by which this same property was devised to Bob Roberts. The will and the devise were approved by the Secretary of the Interior December 1, 1923. Jack Jackson has since died. The defendants herein are his heirs.

Admitting that the restriction on alienation originally contained in the trust patent issued to Jack Williams would have expired in December, 1916, the government contends that such restriction was extended by a series of executive orders making one-year extensions from 1916 to 1919, inclusive, and a further 25-year extension in 1920, and that the conveyance to Jack Jackson, having been made while there was a restriction on alienation imposed by law, was void.

The executive orders in question each recite that they are made under authority found in the Act of June 21, 1906 (34 Stat. pp. 325, 326; USCA tit. 25, sec. 391). This act provides:

> "Prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best."

(1) It will be noted that this statute refers to "any Indian allottee". Jack Williams was not an allottee. He received his trust patent, not under Act. Feb. 8, 1887, (24 Stat. 388; USCA tit. 25, sec. 331, et seq.), creating the Indian allotment system, or any of its subsequent amendments, but under the Act of July 4, 1884, above referred to, conferring homestead entry rights upon Indians. There is no statute which expressly extends the restrictions upon alienation contained in patents issued to Indian homesteaders, or authorizes the President to do so.

The question of the distinction between an Indian homesteader and an Indian allottee was presented to the court in Seaples v. Card (D. C.) 246 F. 501. There an Indian homesteader had received a fee-simple patent under authority of the Act of May 8, 1906, (34 Stat. 183; USCA tit. 25, Sec. 349), permitting the issuance of a fee-simple patent to an Indian allottee determined by the Secretary of the Interior to be competent to manage his own affairs at an earlier time than the end of the restricted period, Judge Rudkin, after quoting the statute, says (page 506):

> "This act is by its terms limited to Indian allottees and confers no authority upon the Secretary of the Interior to cancel patents issued under the act of 1875 or the act of 1884. Why the Secretary of the Interior should be authorized to remove the restriction on alienation in the case of Indian allottees, and not of Indian homesteaders, under the acts of 1875 and 1884, I do not know, and am not at liberty to inquire. Suffice it to say that Congress has spoken, and has granted the authority in the one case, but not in the other."

(2) The same distinction exists in the present case, and I must hold that the executive orders purporting to extend the period of restriction are without effect as far as Indian homestead lands entered under the Act of July 4, 1884, are concerned. Accordingly, it appears that the patentee would have been entitled to a fee-simple patent December 11, 1916, there being no extension of the period of restriction as to him, and a valid conveyance might be made by him or by his heirs at any time subsequent.

(3, 4) It is further urged in the present case, however, that the deed in question was void on account of its failure to conform to the statutory requirements as to form and approval by the Secretary of the Interior prescribed by R. S. Sec. 2103 (USCA

tit. 25, Sec. 81). Reading of this statute discloses that it applies to contracts with tribal Indians as to services relative to their lands, or to claims or demands due to the tribe or the individual under laws or treaties with the United States. It is not applicable to the conveyance by Nellie Williams to Jack Jackson. Contracts made by Indians, not prohibited by statute, are valid, if they conform to the law of the state where they are made. No statute has been called to my attention which prohibits the conveyance which is the subject of this suit, nor prescribes its form. Its form is according to the laws of the state of California, and it has been duly placed on record.

For the reasons set forth above, let judgment be entered for defendants and cross-complainants.

APPENDIX B

TOSS WEAXTA

Decided September 29, 1920.

INDIAN HOMESTEADS—TRUST PERIOD.

The trust period prescribed in trust patents issued under the act of July 4, 1884, runs from the date of issuance of such patent.

ACT OF JUNE 21, 1906—EXTENSION OF TRUST PERIOD.

Indian homesteads and Indian allotments are in all essential respects upon the same footing and are equally within the purview of the act of June 21, 1906, which affords authority for the extension of the trust period in the matter of trust patents issued thereon.

VOGELSANG, First Assistant Secretary:

This appeal is filed on behalf of Toss Weaxta, a full-blood Indian of the Nooksack tribe, from decision of the Commissioner of the General Land Office, dated March 15, 1919, denying his application for issuance of fee patent upon his Olympia homestead entry for lot 6, Sec. 7, lot 3, SE¼ NW¼ and S½ NE¼, Sec. 8 T. 38 N. R., 5 E., W. M. Washington.

The homestead application of Toss Weaxta was filed August 25, 1887, and it appears from indorsements on the papers that his entry was treated as one made under the Indian homestead act of July 4, 1884 (23 Stat. 96). He was not required to pay fees and commissions as is done under the act of March 3, 1875 (18 Stat. 420), which extends the benefits of the homestead law to Indians. The act of 1884 provides:

That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate, may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now

be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appreciated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

The Indian submitted final proof and a final certificate was issued, but he paid no final fee in connection therewith. Trust patent was issued December 11, 1891, in accordance with the above provisions of the act of July 4, 1884. The twenty-five year trust period would have expired under the patent on December 11, 1916, the Department and the courts holding that the trust period begins to run from the date of the trust patent. Klamath allotments (38 L. D., 559, 561); United States v. Reynolds (250 U. S. 104, 109). But on February 23, 1916, the trust period was by order of the President extended for one year, and similar action has been taken in subsequent years. These orders were under authority found in the act of June 21, 1906 (34 Stat. 325, 326), which provides "that prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best."

The above provisions have been invoked and applied indiscriminately as containing authority for the extension of the trust period in the matter of both allotments and Indian homesteads. It is contended, however, that an Indian homestead is not an Indian allotment, and that the act of June 21, 1906, by its terms limits the authority to extend the trust period to "Indian allotments only".

There are two what are known as Indian homestead acts—that of 1875, which granted to a specific class of Indians, those who had abandoned or should abandon their tribal relations, the right to homesteads on the public lands under a restriction against alienation for five years from date of patents; and that of 1884, a general law, which granted to Indians whether they had abandoned their tribal relations or not, rights to homesteads, subject to restrictions for twenty-five years on their alienation. Hemmer v. United States (204 Fed. 828); United States v. Hemmer (241 U. S. 379). The benefits of the acts of 1875 and 1884 are conferred upon Indians as such, and prior to said acts Indians, even

though living apart from their tribes, could not make homestead entry on the public domain. United States v. Joyce (240 Fed. 610, 614). These acts were followed soon after by the general allotment act of February 8, 1887 (24 Stat. 388), which, after providing for allotments of lands in Indian reservations, declared in section 4 thereof that any Indian not residing upon a reservation who should make settlement upon public lands might have the same allotted to him and his children in quantities and manner prescribed for Indians residing upon reservations. The provision in the act of 1887, as to the form, effect, and conditions of patents to be issued is the same as that of the act of 1884. Summarizing the acts of 1875 and 1884, the court in the case of Entiat Delta Orchards Co. v. Unknown Heirs of Saska (168 Pac. 1130, 1133), said:

Under the act of 1875, if an Indian had abandoned his tribal relations, he might upon satisfactory proof of that fact take up public land. He would be required to pay the fees provided by law or prescribed by the Department. In consideration of his abandonment of tribal relations, customs, and restraints, the limitation upon his right to convey or incumber his land was fixed at 5 years. Under the act of 1884, an Indian who had not served his tribal relations, but who stood in the attitude of dependency as one of a tribe and as a ward of the Government, might nevertheless avail himself of the homestead law, but by reason of his tribal character and his dependency as a ward of the Government, no fees for filing or making proof were to be exacted of him, and for like reason his title was to be retained by the Government for a period of 25 years. This reasoning is strengthened by reference to the act of 1887, which may be justly regarded as a legislative interpretation. It makes one qualified under the act of 1875 a full citizen, whereas one who might be qualified under the act of 1884 would not be affected by it.

The fourth section of the act of 1887, although the lands taken thereunder are on the public domain, refers to the lands so taken as allotments. This is against the contention of Toss Weaxta on appeal that the terms "allottee" and "allotments" as defined in the cases cited by him, are necesarily confined or limited to the dividing up of reservation lands or common tribal property.

The Department all along has considered Indian homesteads and Indian allotments upon the public lands as being upon practically the same footing, and Congress has recognized the similarity. An Indian allottee, by virtue of the approval of his allotment by the Secretary of the Interior, acquires equitable title in the land but the legal title remains in the Government. This is equally true of an Indian homesteader under the act of 1884. In the case of Parcher v. Gillen (26 L. D., 34, 41, 43), after referring to the statutes defining the powers and duties of the Department and various decisions of the Supreme Court relating thereto, it was said:

A consideration of these decisions interpreting the statutes defining the authority and duties of the officers of the Land Department clearly demonstrates that so long as the legal title remains in the Government the lands are public within the meaning of those statutes and the laws under which such lands are claimed, or are being acquired, are in process of administration under the supervision and direction of the Secretary of the Interior. * * *

So long as the legal title remains in the Government the Secretary of the Interior, whoever he may be, is charged with the duty of seeing that the land is disposed of only according to law. The issuance of a patent is the final act and decision in that disposition, and with it and not before does the supervisory power and duty of the Secretary cease.

It was held in the case of Doc Jim (32 L. D. 291, 293):

Both the acts of 1875 and 1884 provide special rules and limitations not applicable to other homestead cases, and impose certain restrictions, as to encumbrance and alienation, upon the title the beneficiaries secure. The language of section 5 of the act of February 8, 1887, (24 Stat. 388, 389), with respect to the issuance of patents upon Indian allotments and the trusteeship of the United States, closely follows that of the act of 1884 with respect to Indian homesteads. It is well settled that the issuance of the first or trust patent on an allotment does not terminate the jurisdiction of the Department. Until the issuance of final patent the allottee remains as a ward subject to guardianship whose rights the Department is bound to protect. The language of the act of 1884 is undoubtedly susceptible of the same construction, and all the reasons for the exercise of the protecting care of the Government in the case of an Indian allottee are equally applicable in the case of the Indian homesteader.

In the case of Him Cros (32 L. D. 657, 659), wherein it was held that the provisions of the act of May 27, 1902 (32 Stat. 245, 275), authorizing the sale and conveyance of inherited Indian lands by the heirs of a deceased allottee, applied to the heirs of all Indian claimants for portions of the public lands to whom a trust or other patent containing restrictions upon alienation has been issued, whether the claim was initiated under what are known as Indian homestead laws or under Indian allotment laws, it was said, referring to the acts of 1875 and 1884:

The general allotment act, so far as it affects public lands, and the preceding Indian homestead provisions are so clearly connected that they should be construed in *pari materia* as relating to the same subject matter. The later allotment act but carries forward the policy of the former enactments to give Indians a right to secure homes upon the public domain.

Congress has recognized that allotment claims are of the same nature as homestead rights. A fund had been provided for assisting Indian homesteaders and carried upon the books of the

Treasury Department under the title "Homesteads for Indians", and by the act of March 3, 1891 (26 Stat. 989, 1007), the Secretary of the Interior was authorized and directed to apply the balance of this fund for the employment of allotting agents "to assist Indians desiring to take homesteads under section 4" of the act of February 8, 1887.

Here Congress characterized claims under the allotment act as homesteads. Claims under the various laws relating to Indian homesteads may with equal property be characterized as allotments. In fact the terms mean substantially the same thing so far as the laws in which they are found affect the public lands and so far as the interests of the Indian claimant are concerned.

This Department has considered Indian homesteads upon practically the same footing as Indian allotments upon the public lands. It is held that the Government is bound to protect the rights of the Indian homesteader during the trust period, that no preference right of entry is obtained by contest against an Indian homestead and a relinquishment of an Indian homestead entry does not become effective until approved by this Department. (Doc. Jim, 32 L. D. 291). These rules apply also to Indian allotments. The control, jurisdiction, and obligations of the Department are the same in one case as in the other.

The objects of the laws relating to Indian homesteads are the same as those relating to Indian allotments on the public lands, the status of the Indian claimant is the same under both classes of laws, the duties and obligations of the Government are the same. Both the legislative and the executive branches of the Government have recognized these similarities of purpose in the laws, standing of claimants thereunder, and obligations of the Government.

The act of June 25, 1910 (36 Stat. 855), authorizing the Secretary of the Interior to determine the heirs of deceased Indians, provides "that when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent," etc. In an opinion by the Solicitor for this Department dated December 22, 1917, in the matter of determining the heirs to the estate of Ann Tellop Towtex, a Yakima Indian, which consisted of an Indian homestead under the act of 1884, it was held, after referring to the act of 1910,

> "By the express terms of this act the Department's jurisdiction to determine the heirs of deceased Indians continues until legal title passes from the United States by the issuance of final or fee patent. The act is equally applicable to both Indian homesteaders and Indian allottees to whom trust patents have been issued."

It was said in the case of Robinson v. Steele (157 Pac. 845, 848), after discussing the acts of 1875 and 1884 and numerous decisions thereunder:

"That Congress has ample power to extend the period of limitation upon the power of alienation of Indian homesteads between the time of the making of the original entry by a claimant and the time of the perfection of his title by making final proof is settled by the decisions of the federal courts. United States v. Allen, 179 Fed. 13, 103, C. C. A. 1; United States v. Hemmer (D. C.), 195 Fed. 790; Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578; 55 L. Ed. 738.

It was earnesly contended in the Oklahoma case of United States v. Allen, supra, "that after allotments had been made subject to a specific limitation, the Government was without power to enlarge the period of that limitation; that the Indian obtained a vested right to his allotment, subject only to the restriction which was imposed upon it at the time the allotment was made, and that to enlarge the period of the restriction would be an impairment of his vested rights, in violation of the 14th amendment to the Constitution." But the court held "so long as the lands were held by the Indian allottee, or by an Indian who claimed under him by inheritance, we do not think this contention is sound. The grant of citizenship to the Indian did not destroy the right of the Federal Government to regulate and restrict his use of these lands. Though a citizen of the United States, he did not cease to be an Indian, and both he and his property remained subject to the National Government. Congress has from time to time asserted this authority, and to hold that its enactments in that respect are unconstitutional would be disastrous to the Indians and would probably still further confuse the already complicated title to lands in Oklahoma."

The case of Seaples v. Card (246 Fed. 501), is cited in support of the brief. It is not regarded, however, as necessarily controlling here. The question of the extension of the trust period on Indian homesteads was not involved in that case, nor is the question of the cancellation of Indian homestead patents involved here. The court merely held that the act of May 8, 1906 (34 Stat. 182), amendatory of section 6 of the act of February 8, 1887, while authorizing the Secretary of the Interior in his discretion to issue fee patents to Indian homesteaders under the latter act, did not in terms authorize him to cancel patents issued under the acts of 1875 and 1884. The power to extend the trust period on Indian homesteads is a different proposition and is by analogy and implication, if not directly, found in the act of June 21, 1906, and directly in the policy of the Government looking to the benefit and protection of its Indian wards so long as their property remains under its jurisdiction.

The case of United States v. Senfert Bros. Co. (233 Fed. 579), also cited in the brief, is not in point for the reason that an Indian homestead was not involved, but one made under the regular homestead laws by an Indian who had become a citizen by reason of an allotment on the reservation of his tribe. The Department itself has taken the position that "the provisions of the act

of May 8, 1906, supra, clearly embrace Indians to whom allotments have been made, as such, and not those who by reason of their position have been allowed to make homestead entry as citizens of the United States." Instructions (37 L. D. 219, 225).

That the Department has complete jurisdiction over the public lands until title passes has never been doubted nor denied. As stated in the case of United States v. Hemmer (195 Fed. 790), which involved an entry under the Indian homestead act, "Congress has the power to determine when the guardianship which is maintained over Indians shall cease, and may extend the period of limitation on the alienation of lands by an Indian at any time before the issuance to him of final patent."

"The Department has treated Indian homesteads upon practically the same footing as Indian allotments, and as therefore equally coming within the purview of the act of June 21, 1906, considering the purposes of *pari materia* laws, the condition and standing of the Indians, and the obligations of the Government. The courts have invariably declined to disregard or overrule the construction placed upon statutes by the Executive Departments charged with their administration "except for cogent reasons and unless it is clear that such construction is erroneous" (United States v. Johnston, 124 U. S. 236, 253), or, "unless a different one is plainly required" (Hawley v. Diller, 178 U. S. 476, 488). The Supreme Court, in speaking of a long-continued practice of this Department, said: "Its (Congress) silence was acquiescence. Its acquiescence was equivalent to consent to continue the practice until the power was revoked by some subsequent action by Congress." United States v. Midwest Oil Co. (236 U. S. 459, 481)."

The decision of the Commissioner of the General Land Office herein is affirmed.

No. 5660

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

WALTON N. MOORE DRY GOODS CO., a Corporation, J. H. NEWBAUER & COMPANY, a Corporation, G. W. REYNOLDS CO., INC., a Corporation, and L. DINKELSPIEL CO., INC., a Corporation,

Appellants,

vs.

A. F. LIEURANCE, and PHILLIP A. HERSHEY, as Receivers of R. A. PILCHER CO., INC., a Corporation, Bankrupt,

Appellees.

VOLUME I.

(Pages 1 to 448, Inclusive.)

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print. 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

FRANCIS J. HENEY, Flatiron Building, San Francisco, GRANT H. WREN, 444 Market St., San Francisco, C. A. SHUEY, Merchants Exchange Bldg., San Francisco,

Attorneys for Appellants.

EDWARD R. ELIASSEN, Central Bank Bldg., Oakland, CROSBY & CROSBY, Central Bank Bldg., Oakland,

Attorneys for Appellees.

In the United States District Court, in and for the Northern District of California.

(IN EQUITY—No. 1707.)

SIDNEY GILSON, HERMAN AVRUTINE and SAMUEL AVRUTINE, Copartners Engaged in Business as NATIONAL GARMENT CO.,

Complainants,

vs.

R. A. PILCHER CO., INC.,

Defendant.

PETITION OF A. F. LIEURANCE FOR ANCILLARY PROCEEDINGS AND FOR ORDER APPOINTING HIM AND ARTHUR F. GOTTHOLD RECEIVERS.

To the Honorable, A. F. ST. SURE, Judge of the United States District Court in and for the Northern District of California:

The petition of A. F. Lieurance of Oakland, California, appearing by Edward R. Eliassen, Esq., his attorney, respectfully shows:

I.

That the defendant, R. A. Pilcher Co., Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and having its office and principal place of business at the city of New York, State of New York.

II.

That the above-named plaintiffs are creditors of the R. A. Pilcher Co., Inc., so your petitioner is informed and verily believes, and that on or about the 3d day of June, 1926, the said plaintiffs commenced the above-entitled proceeding and filed their bill of complaint therein in the United States District Court in and for the Southern District of New York, entitled—Sidney Gilson, Herman [1*] Avrutine and Samuel Avrutine, copartners, engaged in business as National Garment Co., Complainants,

*Page-number appearing at the foot of page of original certified Transcript of Record.

against R. A. Pilcher Co., Inc., Defendant, (In Equity—No. 37—146)", wherein the said plaintiffs alleged the necessity for the purpose of conserving the estate of the said defendant and the property thereof for the creditors and for the purpose of obtaining an order which, in effect, would prevent the institution of any bankruptcy proceedings for the time being; and that thereafter and on or about the 3d day of June, 1926, so petitioner is informed and verily believes, an answer was filed on behalf of R. A. Pilcher Co., Inc., defendant, in the said proceeding in the city of New York, and that thereafter and on or about the 3d day of June, 1926, after proceedings, duly had and taken in the premises in the said proceeding then pending in the United States District Court in and for the Southern District of New York entitled "Sidney Gilson, Herman Avrutine and Samuel Avrutine, copartners engaged in business as National Garment Co., Complainants, against R. A. Pilcher Co., Inc., Defendant, (In Equity—37—146)" and the said Court, the Honorable Augustus N. Hand presiding, made its order and decree appointing your petitioner, A. F. Lieurance and Arthur F. Gotthold, the Receivers of the above named defendant R. A. Pilcher Co., Inc., and authorizing and directing them to take possession of all the property and effects of the said R. A. Pilcher Co., Inc., wherever situate and do and perform all other things and acts as in said order set out, a true and correct copy of which said order is hereto attached and made a part hereof and specifically referred to. And the said A. F.

Lieurance and Arthur F. Gotthold in compliance [2] with said order did each of them file in the said United States District Court, Southern Division of New York a good and sufficient Surety Company bond in the sum of Ten Thousand ($10,000) Dollars, and did thereupon qualify as such Receivers and that they ever since have been and now are the duly appointed qualified and acting Receivers of R. A. Pilcher Co., Inc.

III.

That the said R. A. Pilcher Co., Inc., is engaged in the Merchandise Business and has been and now is maintaining and conducting stores in the cities of Stockton, Turlock, and Oroville in the State of California and within the jurisdiction of the United States District Court in and for the Northern District of California.

IV.

That several attachment suits have been filed against the aforementioned defendant and attachments levied against the property of the defendant contained in said stores and against moneys on deposit in banks belonging to said stores and to said defendant which require the immediate attention of the said Receivers for the purpose of preserving and protecting the assets and property of the said defendant R. A. Pilcher Co., Inc., in accordance with the order of June 3, 1926.

V.

That by the order of June 3, 1926, hereinabove

referred to, your petitioner and the said Arthur F. Gotthold, as Receivers, were authorized to institute ancillary proceedings in all State and Federal Courts and that it is necessary and proper that A. F. Lieurance and Arthur F. Gotthold, Receivers, appointed by the said New York court, be appointed Receivers in the premises by the above-entitled court and that ancillary proceedings be instituted herein for the purpose of the preservation of the estate and [3] property and effects of the said defendant and that ancillary Receivers be appointed herein.

VI.

That it is the purpose of the Receivers to continue the operation of the aforementioned business for the time being and that for the purpose of supplying the aforementioned stores and other stores of defendant corporation situate in the States of Oregon and Washington with the necessary merchandise, the said Arthur F. Gotthold, as Receiver, has arranged to borrow sufficient money upon receivers' certificates, the said certificates to be pledged by merchandise of the said corporation, and that for such purpose in the premises it will be necessary to obtain an order of the above-entitled court permitting the said Receivers to issue such certificates and to borrow money thereon and to pledge the assets of the defendant corporation as security for the said certificates, and that in addition to said fact, the institution of ancillary proceedings is warranted for the reason that it is desirable and may be necessary to have process issued in such

proceeding for the purpose of the attendance and examination of witnesses and of books and papers and for the purpose of enforcing any other right that may be necessary in the administration of the above-entitled estate within the jurisdiction of the above-entitled court for the purpose of maintaining and conducting the said business within said jurisdiction and preserving the estate for the benefit of all creditors and for the defendant corporation.

WHEREFORE: Your petitioner, A. F. Lieurance, as Receiver, respectfully petitions the above-entitled court [4] for an order of ancillary proceedings herein and in aid of the said A. F. Lieurance and Arthur F. Gotthold as Receivers; and for an order appointing them, the said A. F. Lieurance and Arthur F. Gotthold, Receivers of R. A. Pilcher Co., Inc., within the jurisdiction of the above-entitled court, and authorizing and empowering them and each of them to act as such Receivers and do any and all things authorized by the aforementioned order of June 3, 1926, made by the United States District Court in and for the Southern District of New York in the above-entitled proceeding; and for such other and further relief in the premises as to the Court may seem meet, just and equitable.

A. F. LIEURANCE,
Petitioner.

EDWARD R. ELIASSEN,
Attorney for Petitioner, Central Bank Building, Oakland, California. [5]

State of California,
County of Alameda,—ss.

A. F. Lieurance, being first duly sworn, deposes and says: That he is the petitioner in the above-entitled proceeding and that he has read and signed the foregoing petition; that the matters therein stated are true of his own knowledge, except as to the matters which are therein stated upon his information and belief, and as to those matters that he believes it to be true.

A. F. LIEURANCE.

Subscribed and sworn to before me this 9th day of June, 1926.

EDWARD R. ELIASSEN,
Notary Public in and for the County of Alameda, State of California. [6]

United States District Court, Southern District of New York.

IN EQUITY—37-146.)

SIDNEY GILSON, HERMAN AVRUTINE and SAMUEL AVRUTINE, Copartners Engaged in Business as NATIONAL GARMENT CO.,

Complainants,

against

R. A. PILCHER CO., INC.,

Defendant.

ORDER APPOINTING RECEIVER.

And now on this 3d day of June, 1926, this cause came on to be heard upon the bill of complaint duly filed herein, and the answer of the defendant hereto this day likewise filed, and upon a motion of the plaintiff for the appointment of a Receiver, and after hearing Irving L. Ernst, of counsel, representing the complainant, and after due deliberation, it is adjudged that the complainant upon the facts contained in the said bill and upon said answer is entitled to the relief hereby granted, and it is

On motion of McManus, Ernst & Ernst, attorneys for the complainant,

ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

That Arthur F. Gotthold of the city of New York and A. F. Lieurance of Oakland, California, be and they hereby are appointed temporary Receivers of the above-named defendant and all of the property, assets and effects of said defendant, or in which the said defendant has any ownership or interest, whether such property be real, personal and mixed and of whatsoever kind and description and wheresoever situate, and of all office furniture, fixtures, books of account, records and other books, papers and accounts, [7] cash on hand or in bank or on deposit, things in action, credits, stocks, bonds, securities, shares of stock, notes or bills receivable, muniments of title, as well as all other property of

every character and description whatsoever of the defendant, and it is further

ORDERED, ADJUDGED AND DECREED that the said Receivers be and they are hereby authorized forthwith to take possession and control and custody of all said property, assets and effects of said defendants; that said Receivers are authorized to do all and any things and enter into all or any agreements as may be deemed by them necessary or advisable to preserve and protect the said property or assets; in their discretion to employ and discharge and to fix the compensation of such officers, agents, and employees as may, in their judgment, be necessary or advisable in the administration of this estate; to employ accountants and counsel, and to make such payments and disbursements as may be needful or proper in the preservation of the assets of the defendant.

Said Receivers are further authorized and empowered to institute, prosecute, defend, compromise, adjust, intervene in or become party to such suits, actions or proceedings at law or in equity including ancillary proceedings in state or federal courts, as may in their judgment be necessary or proper for the protection and preservation of the assets of the defendant or the carrying out of the terms of this decree, and likewise to defend, compromise or adjust, or otherwise dispose of all or any suits, actions or proceedings now pending in any court by or against the said defendant where such prosecution, compromise, defense [8] or other disposition of such suit or action will in the judgment of said Re-

ceivers be advisable or proper for the protection of the assets of the above-named defendants, and such Receivers are authorized to settle with, compromise, collect from or make allowance to debtors of the above-named defendant; to enter into such arrangements, compositions, extension or otherwise with debtors of the defendant as the said Receivers may deem advisable; and generally said Receivers are authorized to do all acts, enter into any agreements and accept, adopt or abandon any or all contracts as may be deemed by such Receivers advisable for the protection or preservation of the assets of the above-named defendant. And it is further

ORDERED that the bonds of the said Receivers in the sum of ten thousand dollars each conditioned that he will well and truly perform the duties of his office and duly account for all moneys and property which come into his hands and abide by and perform all things which he shall be directed to do, with sufficient sureties to be approved by a judge of this Court, be filed with the Clerk of this court within two (2) days from the date of this order. And it is further

ORDERED, ADJUDGED AND DECREED that said defendant, its officers and directors, agents and employees, and all other persons claiming to act by, through or under or for said defendant, and all other persons, firms and corporations including creditors of the defendant, and including all sheriffs, marshals, constables and their agents, and deputies, and all other officers are hereby enjoined from transferring, removing, disposing of or attempting in any

way to remove, transfer or dispose of or in any way [9] interfere with any of the properties owned by or in the possession of said defendant, and all said persons, firms and corporations are enjoined from doing any act whatsoever to interfere with the possession and management by said Receivers of the properties of the defendant, or in any way to interfere with the said Receivers in the discharge of their duties, or to interfere in any way with the administration and disposition in this suit of the affairs and properties of the defendant, and all creditors of the said defendant are hereby enjoined from instituting or prosecuting or continuing the prosecution of any pending actions, suits or proceedings at law or in equity, or under any statute against the said defendant, and from levying any attachments, executions or other processes, upon or against any of the properties of the said defendant, or from taking or attempting to take into their possession any of the properties of the said defendant, and from issuing or causing the execution or issuance out of any court of any writ, process, summons, subpoena, replevin or attachment, and it is further

DECREED that the Receivers be and they hereby are directed within thirty (30) days from the date of this decree, to cause to be mailed to each and every creditor of the defendant known to such Receivers, a copy of this order and a notice of a motion to make the receivership herein permanent, such mailing to be in a securely sealed envelope, postage prepaid, and to be addressed to said credi-

tor at the last postoffice address known to the said Receivers and such service by mail is hereby decreed to be due, timely, sufficient and complete service of notice of this decree and this suit and of such notice and all proceedings had or to be had herein and upon all such creditors for all purposes. And it is further [10]

DECREED that all such creditors of the defendant be, and they hereby are directed to file with the Receivers or any permanent Receivers at such office or place of business as said Receivers may designate at within ninety (90) days from the date of this order, a duly sworn statement of all or any such claims as they such creditors, may have or assert against the defendant, and such statement shall be verified before any officer authorized to administer oaths by the laws of the state where such claim is verified and such statements of said claims shall, where the same is evidenced by any written instrument, have such written instrument attached thereto. And it is further

DECREED that notice of the time and place for the filing of the said claim shall be published at least four times before the expiration of said period of ninety (90) days in the "New York Times." And it is further

DECREED that all such creditors as shall fail to file their claims with said Receivers as herein provided, and within the time fixed, shall be debarred from any share of, in or to, the properties of the said defendant, and shall not be entitled to

receive any share thereof, or of the proceeds thereof. And it is further

DECREED that the Receivers shall have leave to apply for such other or further orders as may to them from time to time seem advisable or necessary in the adminisration of this estate.

AUGUSTUS N. HAND,
U. S. D. J.

A true copy.

[Seal] ALEX GILCHRIST, Jr.,
Clerk.

[Endorsed]: Filed June 9, 1926. [11]

The President of the United States of America, to All to Whom These Presents Shall Come, GREETING:

KNOW YE, That we having inspected the records and files of the District Court of the United States for the Southern District of New York, do find certain paper writings there, remaining of record, in the words and figures following, to wit: [12]

United States District Court, Southern District of New York.

E.–37—146.

SIDNEY GILSON, HERMAN AVRUTINE and SAMUEL AVRUTINE, Co-partners Engaged in Business as NATIONAL GARMENT CO.,

Complainants,

against

R. A. PILCHER CO., INC.,

Defendant.

BILL OF COMPLAINT.

To the Honorable District Court of the United States, for the Southern District of New York:

The complainants above named, by McManus, Ernst & Ernst, for a bill of complaint herein, allege and show to this Honorable Court:

First. The complainants and all of them were at all the times herein mentioned and now are residents and citizens of the Borough of Manhattan, city of New York, which is in the Southern District of the State of New York, and are copartners engaged in business under the name and style of National Garment Co. at No. 501–7th Avenue, Borough of Manhattan, city of New York, and bring this bill of complaint on their own behalf and on behalf of all creditors of the defendant.

Second. The defendant is a corporation duly organized and existing under and by virtue of the

laws of the State of Delaware, having its principal legal office and place for the transaction of its business at the city of Wilmington, in the State of Delaware, and is a resident of the State of Delaware; but the defendant has and maintains its principal business and financial office in the [13] city of New York, State of New York, in the Southern District of New York.

Third. The defendant is engaged in operating a chain of department stores, in which it sells articles of such a nature usually sold in department stores carrying an inventory consisting of a wide range of articles of apparel and general utility, and defendant now operates in the states on or adjacent to the west coast of the United States sixteen (16) such department stores.

Fourth. By reason of too quick and large an expansion and an overstocking of merchandise, with too small a cash capital to meet the requirements of the business, the defendant is unable to meet its maturing obligations although the business is progressing favorably, the stores well located and well stocked with seasonable merchandise.

Fifth. The defendant is indebted to the complainant in the sum of Nine Thousand Six Hundred Seven and 10/100 Dollars ($9,607.10) for merchandise sold and delivered by the complainant to the defendant, which sum is now due and payable, but which sum the defendant has been unable to pay because it has not the ready cash available therefor.

Sixth. Upon information and belief, the defendant is indebted to various other creditors for money

borrowed for merchandise sold and delivered to the defendant and for accounts payable, in the aggregate sum of approximately Seven Hundred Thousand Dollars ($700,000.).

Seventh. Upon information and belief, the defendant is without sufficient funds to meet its present obligations, some of which are long past due, although the defendant has assets sufficient to cover its said obligations [14] and a substantial surplus if said assets can be liquidated in the usual and ordinary course of business, but not through a forced attachment, execution or foreclosure sale.

Eighth. Upon information and belief, the defendant is in possession of assets of a reasonable value of approximately Nine Hundred and Fifteen Thousand Dollars ($915,000.) consisting of seasonable merchandise at cost price of Seven Hundred Thousand Dollars ($700,000.); fixtures and leaseholds, One Hundred and Forty Thousand Dollars ($140,000.); and accounts receivable and money in banks, Seventy-five Thousand Dollars ($75,000.).

Ninth. Upon information and belief, various of the creditors of the defendant are pressing their claims for judgment and many suits have been commenced by small creditors in New York and elsewhere, who have attached, or who threaten to attach the property of the defendant, and such suits may result in a forced sale of the property and assets of the defendant, or some part thereof, which forced sales would result in hardship and damage to the complainant and the other large creditors, as well as the defendant.

Tenth. Upon information and belief, the defendant is now conducting a large and progressive business; that its sales approximate One Hundred Sixty Thousand Dollars ($160,000) a month; but that its capital is inadequate for so large a business until the inventory of merchandise which it has on hand and which was purchased for last winter's business, but cannot be sold until late summer or fall of this year, is moved.

Eleventh. Upon information and belief, the complainant avers that if the defendant's assets are not taken into judicial custody, inequitable preferences against the [15] complainant and other creditors might result, and unless all actions and proceedings at law, including executions, attachments and other proceedings are enjoined, there will be a serious dissipation of the assets of the defendant.

Twelfth. In order that the property of the defendant may be preserved for equitable distribution among those entitled thereto, the complainant believes that this Honorable Court should intervene and appoint a Receiver to take charge of all of the assets of the defendant, who shall conduct, manage and administer the same under the power to be conferred upon him in the proposed decree herewith submitted.

Thirteenth. Your complainant shows that the amount of the recovery in this suit is in excess of Three Thousand Dollars ($3,000) exclusive of interest and costs.

Fourteenth. Inasmuch therefore as your com-

plainant has no adequate remedy at law, and can have relief only in equity, your complainant files this bill of complaint in behalf of itself and other creditors of the defendant, who may thereafter join herein, and prays for equitable relief, as follows:

1. That this Honorable Court will administer all the properties, assets and effects, rights and business belonging to the defendant, and will adjudicate, enforce, adjust and determine the rights, equities and claims of all the creditors of the defendant, including the claim of your complainant.

2. That this Honorable Court will forthwith appoint a Receiver or Receivers of all and singular the property of the defendant, of whatsoever nature, with full [16] power to take into their possession, hold and manage the same under the direction of this Court with such powers as this Court may from time to time grant; to continue the business, in his or their discretion, to bring suit for, collect, receive and take into their possession all of the property and assets of the defendant including books, records, vouchers, cheques, moneys, real estate and all other property, real, personal or mixed; to institute, prosecute or defend any actions at law or in equity or under any statute for the recovery, protection and maintenance of any of the assets or properties of the defendant, as they may deem necessary or proper, including the institution and prosecution of any such ancillary proceedings as they may deem advisable; to settle, collect, compound, adjust or make allowances upon any debts that may be due or owing to the defendant as they

may deem proper; to pay any such claims, wages or otherwise, as may have priority; and, in general, with all the usual powers of Receivers in such cases.

3. That the officers, managers, employees, creditors and stockholders of the defendant and all other persons, firms and corporations be required forthwith to transfer, convey and deliver up to such Receiver or Receivers possession of all property of the defendant wheresoever situate.

4. That all persons, firms and corporations, be enjoined from instituting, commencing, prosecution or continuing the prosecution of any actions, suits or proceedings at law or in equity, or under any statute against defendant, or from levying or serving any attachments or executions or other processes upon the defendant or upon [17] or against any of the property of the said defendant, save and except the filing of mechanic's lien or other statutory liens, and generally that all persons, firms and corporations be enjoined from doing any act to interfere with said Receivers in their possession of the property of the defendant.

5. That a writ of injunction issue out of and under the seal of this Honorable Court, or issue by one of your Honors, directing, enjoining and restraining the defendant and its officers, agents and employees, and all other persons whatsoever from interfering with, transferring, selling or disposing of any of the property of said defendant.

6. That this Honorable Court will grant a writ of subpoena under the seal of this Honorable Court, directed to defendant and commanding it on a date

certain therein named, before this Honorable Court, to answer (but not under oath, answer by oath being expressly waived), all and any of the premises, and to stand by, perform and abide by such orders and decrees as may be made by this Honorable Court.

7. That a decree appointing a Receiver or Receivers of the property of the defendant and granting the relief prayed for in this bill of complaint may be granted by this Honorable Court in the form herewith submitted.

8. That at such time as may be found just and proper the properties of the defendant may be ordered to be sold, in whole or in part, for cash or on credit, in such manner and upon such conditions as this Court may deem just and equitable, and that any such decree of sale shall make proper and equitable provision for the preservation of all equities, rights and properties, claims [18] and liens of all creditors and shall provide for the sale of the property of the defendant subject to or free of liens and encumbrances, in whole or in part, as this Court may direct, and that the proceeds of any such sale be distributed among these entitled thereto, as this Honorable Court shall adjudicate, or that the properties of the defendant, in whole or in part, may be returned to it; and that your Complainant may have such other and further relief in the premises as may be just and equitable, and that the defendant may be directed to make such bills of sale, assignments, transfers and conveyances of any such property as may be directed to be sold by this Court.

9. That such order shall be made by this Hon-

orable Court, as to the service of this bill of complaint and of any order that may be made in this suit as may be deemed sufficient and proper by this Court.

10. That your complainant may have such other and further relief as may be just and proper.

And your complainant will ever pray.

McMANUS, ERNST & ERNST.

McMANUS, ERNST & ERNST,
Solicitors for Complainant, 170 Broadway,
New York City. [19]

State of New York,
County of New York,—ss.

Herman Avrutine being duly sworn, says: That he is one of the complainants above named; that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

HERMAN AVRUTINE.

Sworn to before me this 2d day of June, 1926.

EMILY SCHOBAUM,
Bronx Co. Clks. No. 199, Reg. No. 2773A. New York County Clks. No. 953. Reg. No. 7721.
Com. expires March 30, 1927. [20]

United States District Court Southern District of New York.

E.–37—146.

SIDNEY GILSON, HERMAN AVRUTINE and SAMUEL AVRUTINE, Copartners Engaged in Business as NATIONAL GARMENT Co.,

Complainants,

against

R. A. PILCHER CO., INC.,

Defendant.

ANSWER.

AND now comes the defendant herein, by Horwitz, Rosston & Hort, its attorneys, and for an answer to the bill of complaint filed herein, hereby admits each and every allegation contained in the bill of complaint, and joins in the bill of complaint and prays that such decree be made in the promises as may be just and proper and for the full protection of the complainants, the defendant and all creditors of the defendant, and the defendant will ever pray, etc.

HORWITZ, ROSSTON & HORT,
Attorneys for Defendant,

Office and Post Office Address: 141 Broadway, Borough of Manhattan, New York City. [21]

State of New York,
County of New York,—ss.

Frederick Lomberg being duly sworn, says: That he is secretary of R. A. Pilcher Co., Inc., the Defendant above named; that he has read the foregoing answer and knows the contents thereof, and that the same is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

FREDERICK LOMBERG,

Sworn to before me this 2d day of June, 1926.

[Seal] VINIE A. BOWDERY,
Notary Public, Kings County.

Kings Co. Clerk's No. 970. Registers No. 7535. Certificate filed in New York County. County Clerk's No. 989A. Registers No. 7061.
Commission expires March 30, 1927. [22]

United States District Court Southern District of New York.

(IN EQUITY—37—146.)

SIDNEY GILSON, HERMAN AVRUTINE and SAMUEL AVRUTINE, Copartners Engaged in Business as NATIONAL GARMENT CO.,

Complainants,

against

R. A. PILCHER CO., INC.,

Defendant.

ORDER APPOINTING RECEIVER.

And now on this 3d day of June, 1926, this cause came on to be heard upon the bill of complaint duly filed herein, and the answer of the defendant hereto this day likewise filed, and upon a motion of the plaintiff for the appointment of a Receiver, and after hearing Irving L. Ernst, of counsel, representing the complainant, and after due deliberation, it is adjudged that the complainant upon the facts contained in the said bill and upon said answer is entitled to the relief hereby granted, and it is

On motion of McManus, Ernst & Ernst, attorneys for the complainant

ORDERED, ADJUDGED AND DECREED as follows:

That Arthur F. Gotthold of the city of New York and A. F. Lieurance of Oakland, California, be and they hereby are appointed temporary Receivers of the above-named defendant and all of the property, assets and effects of said defendant, or in which the said defendant has any ownership or interest, whether such property be real, personal and mixed, and of whatsoever kind and description and wheresoever situate, and of all office furniture, fixtures, books of account, records and other books, papers and accounts, [23] cash on hand or in bank or on deposit, things in action, credits, stocks, bonds, securities, shares of stock notes or bills receivable, muniments of title, as well as all other property of

every character and description whatsoever of the defendant, and it is further

ORDERED, ADJUDGED AND DECREED that the said Receivers be and they are hereby authorized forthwith to take possession and control and custody of all said property, assets and effects of said defendants; that said Receivers are authorized to do all and any things and enter into all or any agreements as may be deemed by them necessary or advisable to preserve and protect the said property or assets; in their discretion to employ and discharge and to fix the compensation of such officers, agents and employees as may, in their judgment, be necessary or advisable in the administration of this estate; to employ accountants and counsel, and to make such payments and disbursements as may be needful or proper in the preservation of the assets of the defendant.

Said Receivers are further authorized and empowered to institute, prosecute, defend, compromise, adjust, intervene in or become party to such suits, actions or proceedings at law or in equity, including ancillary proceedings in state or federal courts, as may in their judgment be necessary or proper for the protection and preservation of the assets of the defendant or the carrying out of the terms of this decree, and likewise to defend, compromise or adjust, or otherwise dispose of all or any suits, actions or proceedings now pending in any court by or against the said defendant where such prosecution, compromise, defense [24] or other disposition of such suit or action will in the judgment of said Re-

ceivers be advisable or proper for the protection of the assets of the above-named defendants, and such Receivers are authorized to settle with, compromise, collect from or make allowance to debtors of the above-named defendant; to enter into such arrangements, compositions, extension or otherwise with debtors of the defendant as the said Receivers may deem advisable; and generally said Receivers are authorized to do all acts, enter into any agreements and accept, adopt or abandon any or all contracts as may be deemed by such Receivers advisable for the protection or preservation of the assets of the above-named defendant. And it is further

ORDERED that the bonds of the said Receivers in the sum of Ten Thousand Dollars each conditioned that he will well and truly perform the duties of his office and duly account for all moneys and property which come into his hands and abide by and perform all things which he shall be directed to do, with sufficient sureties to be approved by a Judge of this court, be filed with the Clerk of this court within two (2) days from the date of this order. And it is further

ORDERED, ADJUDGED AND DECREED that said defendant its officers and directors, agents and employees and all other persons claiming to act, by, through or under or for said defendant, and all other persons, firms and corporations, including creditors of the defendant, and including all sheriffs, marshals, constables and their agents and deputies, and all other officers, are hereby enjoined from transferring, removing, disposing of or attempting

in any way, to remove, transfer or dispose of or in any way interfere [25] with any of the properties owned by or in the possession of said defendant, and all said persons, firms and corporations are enjoined from doing any act whatsoever to interfere with the possession and management by said Receivers of the properties of the defendant, or in any way to interfere with the said Receivers in the discharge of their duties, or to interfere in any way with the administration and disposition in this suit of the affairs and properties of the defendant, and all creditors of the said defendant are hereby enjoined from instituting or prosecuting or continuing the prosecution of any pending actions, suits or proceedings at law or in equity, or under any statute against the said defendant, and from levying any attachments, executions or other processes, upon or against any of the properties of the said defendant, or from taking or attempting to take into their possession any of the properties of the said defendant, and from issuing or causing the execution or issuance out of any court of any writ, process, summons, subpoena, replevin or attachment, and it is further

DECREED that the Receivers be and they hereby are directed within thirty (30) days from the date of this decree, to cause to be mailed to each and every creditor of the defendant known to such Receivers, a copy of this order and a notice of a motion to make the receivership herein permanent, such mailing to be in a securely sealed envelope, postage prepaid, and to be addressed to said credi-

tor at the last postoffice address known to the said Receivers and such service by mail is hereby decreed to be due, timely sufficient and complete service of notice of this decree and this suit and of such notice and all proceedings had or to be had herein and upon all such creditors for all purposes. And it is further [26]

DECREED that all such creditors of the defendant be, and they hereby are directed to file with the Receivers or any permanent Receivers at such office or place of business as said Receivers may designate at within ninety (90) days from the date of this order, a duly sworn statement of all or any such claims as they such creditors, may have or assert against the defendant, and such statement shall be verified before any officer authorized to administer oaths by the laws of the State where said claim is verified and such statements of claims shall, where the same is evidenced by any written instrument, have such written instrument attached thereto. And it is further

DECREED that notice of the time and place for the filing of the said claim shall be published at least four times before the expiration of said period of ninety (90) days in the New York Times. And it is further

DECREED that all such creditors as shall fail to file their claims with said Receivers as herein provided, and within the time fixed, shall be debarred from any share of, in or to, the properties of the said defendant, and shall not be entitled to

receive any share thereof, or of the proceeds thereof. And it is further

DECREED that the Receivers shall have leave to apply for such other or further orders as may to them from time to time seem advisable or necessary in the administration of this estate.

AUGUSTUS N. HAND,
U. S. D. J. [27]

ALL of which we have caused by these presents to be exemplified, and the seal of the said District Court to be hereunto affixed.

WITNESS, the Honorable AUGUSTUS N. HAND Judge of the District Court of the United States for the Southern District of New York, at the city of New York, in the Southern District of New York, this 14th day of June, in the year of our Lord one thousand nine hundred and twenty-six and of our Independence the one hundred and fiftieth.

[Seal] ALEXANDER GILCHRIST, Jr.,
Clerk.

United States of America,
Southern District of New York,—ss.

I, Augustus N. Hand, one of the Judges of the District Court of the United States for the Southern District of New York, do hereby certify, that Alexander Gilchrist, Jr., whose name is subscribed to the preceding exemplification, is the Clerk of the said District Court, duly appointed and sworn, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the said

exemplification is the Seal of the said District Court, and that the attestation thereof is in due form of law.

Dated New York, June 14th, 1926.

AUGUSTUS N. HAND,
United States District Judge.

United States of America,
Southern District of New York,—ss.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, do hereby certify, that Hon. Augustus N. Hand, whose [28] name is subscribed to the preceding certificate, is one of the Judges of the District Court of the United States for the Southern District of New York, duly appointed and sworn, and that the signature of said Judge to said Certificate is genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said court, at the city of New York, in the Southern District of New York, this 14th day of June, 1926.

[Seal] ALEXANDER GILCHRIST, Jr.,
Clerk.

[Endorsed]: Filed June 30, 1928. [29]

[Title of Court and Cause.]

ORDER IN ANCILLARY PROCEEDINGS APPOINTING RECEIVERS, ETC.

The verified petition of A. F. Lieurance, filed on behalf of himself and Arthur F. Gotthold in the above-entitled matter, petitioning for the appointment of the said A. F. Lieurance and Arthur F. Gotthold as Receivers of the R. A. Pilcher Co., Inc., in the above-entitled proceeding in ancillary proceedings coming on this 9th day of June, 1926, to be heard, and upon motion of Edward R. Eliassen, Esq., representing the said Petitioner, and after due deliberation and good cause appearing therefor; and it appearing to the above-entitled court that the relief asked for should be granted; and it further appearing that the United States District Court in and for the Southern District of New York in the above-entitled proceeding (In Equity—No. 37—146), the Honorable Augustus N. Hand, United States District Court Judge, made its Order on the 3d day of June, 1926, appointing the said A. F. Lieurance and Arthur F. Gotthold as Receivers in the above-entitled proceeding and authorizing and empowering them, among other things, to institute ancillary proceedings:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED herein as follows: [30]

That Arthur F. Gotthold of the city of New York, and A. F. Lieurance of Oakland, California, be and

they hereby are appointed temporary Receivers of the above-named defendant and all of the property, assets and effects of said defendant, or in which said defendant has any ownership or interest, whether such property be real, personal and mixed, and of whatsoever kind and description and wheresoever situate, and of all office furniture, fixtures, books of account, records and other books, papers and accounts, cash on hand or in bank or on deposit, things in action, credits, stocks, bonds, securities, shares of stock, notes or bills receivable, muniments of title, as well as all other property of every character and description whatsoever of the defendant, and it is further

ORDERED, ADJUDGED AND DECREED that the said Receivers be and they are hereby authorized forthwith to take possession and control and custody of all said property assets and effects of said defendants; that said Receivers are authorized to do all and any things and enter into all or any agreements as may be deemed by them necessary or advisable to preserve and protect the said property or assets; in their discretion to employ and discharge and to fix the compensation of such officers, agents and employees as may, in their judgment, be necessary or advisable in the administration of this estate; to employ accountants and counsel, and to make such payments and disbursements as may be needful or proper in the preservation of the assets of the defendant.

Said Receivers are further authorized and empowered to institute, prosecute, defend, compromise,

adjust, intervene in or become party to such suits, actions or proceedings at law or in equity, including ancillary [31] proceedings in state or federal courts, as may in their judgment be necessary or proper for the protection and preservation of the assets of the defendant or the carrying out of the terms of this decree, and likewise to defend, compromise or adjust, or otherwise dispose of all or any suits, actions, or proceedings now pending in any court by or against the said defendant where such prosecution, compromise, defense or other disposition of such suit or action will in the judgment of said Receivers be advisable or proper for the protection of the assets of the above-named defendants, and such Receivers are authorized to settle with, compromise, collect from or make allowance to debtors of the above named defendant; to enter into such arrangements, compositions, extension or otherwise with debtors of the defendant as the said Receivers may deem advisable; and generally said Receivers are authorized to do all acts, enter into any agreements and accept, adopt or abandon any or all contracts as may be deemed by such Receivers advisable for the protection or preservation of the assets of the above-named defendant. And it is further

ORDERED that the bonds of the said Receivers in the sum of Ten Thousand Dollars ($10,000.) each conditioned that he will well and truly perform the duties of his office and duly account for all moneys and property which come into his hands and abide by and perform all things which he shall be di-

rected to do, with sufficient sureties to be approved by a Judge of this court, be filed with the Clerk of this court within ten (10) days from the date of this order. And it is further

ORDERED, ADJUDGED AND DECREED that said defendant, [32] its officers and directors, agents and employees, and all other persons claiming to act by, through or under or for said defendant, and all other persons, firms and corporations, including creditors of the defendant and including all sheriffs, marshals, constables and their agents and deputies, and all other officers, are hereby enjoined from transferring, removing, disposing of or attempting in any way to remove, transfer or dispose of or in any way interfere with any of the properties owned by or in the possession of said defendant, and all said persons, firms and corporations are enjoined from doing any act whatsoever to interfere with the possession and management by said Receivers of the properties of the defendant, or in any way to interfere with the said Receivers in the discharge of their duties, or to interfere in any way with the administration and disposition in this suit of the affairs and properties of the defendant, and all creditors of the said defendant are hereby enjoined from instituting or prosecuting or continuing the prosecution of any pending actions, suits or proceedings at law or in equity, or under any statute, against the said defendant, and from levying any attachments, executions or other processes, upon or against any of the properties of the said defendant, or from taking or attempting to

take into their possession any of the properties of the said defendant, and from issuing or causing the execution or issuance out of any court of any writ, process, summons, subpoena, replevin or attachment, and it is further

DECREED that the Receivers be and they hereby are directed within thirty (30) days from the date of this [33] decree, to cause to be mailed to each and every creditor of the defendant known to such Receivers, a copy of this order and a notice of a motion to make the receivership herein permanent, such mailing to be in a securely sealed envelope, postage prepaid, and to be addressed to said creditor at the last postoffice address known to the said Receivers and such service by mail is hereby decreed to be due, timely, sufficient and complete service of notice of this decree and this suit and of such notice and all proceedings had or to be had herein and upon all such creditors for all purposes. And it is further

DECREED that all such creditors of the defendant be, and they hereby are directed to file with the Receivers or any permanent Receivers at such office or place of business as said Receivers may designate at within ninety (90) days from the date of this order, a duly sworn statement of all or any such claims as they, such creditors, may have or assert against the defendant, and such statement shall be verified before any officer authorized to administer oaths by the laws of the State where said claim is verified and such statements of claims

shall, where the same is evidenced by any written instrument, have such written instrument attached thereto. And it is further

DECREED that notice of the time and place for the filing of the said claim shall be published at least four times before the expiration of said period of ninety (90) days in the Oakland Tribune. And it is further

DECREED that all such creditors as shall fail to file their claims with said Receivers as herein provided, and within the time fixed, shall be debarred from any share of, in or to the properties of the said defendant, and shall not be entitled to receive any share thereof, or of [34] the proceeds thereof. And it is further

DECREED that the Receivers shall have leave to apply for such other or further orders as may to them from time to time seem advisable or necessary in the administration of this estate.

Dated: June 9, 1926.

A. F. ST. SURE,
Judge of the United States District Court.

[Endorsed]: Filed June 9, 1926. [35]

[Title of Court and Cause.]

ORDER CONTINUING RECEIVERS AND MAKING THEM PERMANENT.

And now, on the 9th day of August, 1926, this cause having come on to be heard on the return of

an application to continue the appointment of Arthur F. Gotthold and A. F. Lieurance as Receivers of the property of the defendant appointed by the above-entitled court by order dated the 9th day of June, 1926, and to make them permanent Receivers, and for such other order or decree as to the Court may seem proper and just; and

After reading and filing the report of the Receivers dated July 22d, 1926; and

After hearing Edward R. Eliassen, Esq., attorney for the Receivers in support of the application; and

No person appearing in opposition thereto; and

On reading and filing the notice of hearing with proof of due service; and

Due deliberation having been had;

Now, on motion of Edward R. Eliassen, Esq., attorney for the temporary Receivers, it is hereby ORDERED, ADJUDGED and DECREED as follows:

One. That Arthur F. Gotthold of the city of New York, and A. F. Lieurance of Oakland, California, be and they are hereby continued as and made permanent Receivers of the property of the defendant with all powers and duties mentioned and set forth in the order of their appointment as [36] temporary Receivers dated June 9th, 1926, and also with all the powers and duties mentioned in an order of the above-entitled court made on the 30th day of June, 1926; and it is further

Two. ORDERED, ADJUDGED AND DECREED that the bonds heretofore filed by the Re-

ceivers herein be and they are hereby deemed to be filed by them as permanent, as well as temporary Receivers and that a copy of this order be duly served upon the surety on the bonds of the said Receivers; and it is further

Three. ORDERED, ADJUDGED AND DECREED that the Receivers are hereby authorized to continue the business of the defendant in the usual and ordinary course until the further order of this Court in the premises, except that the Receivers be and they are hereby authorized, in their discretion, to sell, without further order, for cash, such stores, either separately or in bulk, as may prove unprofitable or as they may deem unprofitable to continue further. Notice, however, of the proposed sale of such store or stores and the terms thereof shall be given to all creditors by mail at least ten (10) days before the proposed transfer so that the creditors or others interested may, if they see fit, make other or better bids therefor, in which event, the Receivers are authorized to sell the said store or stores to the highest bidder therefor and to deliver good and sufficient bill or bills of sale and documents of title without the further order of this Court; and it if further

Four. ORDERED, ADJUDGED AND DECREED that the appointments of Phillip A. Hershey & Company as accountants, and of Edward R. Eliassen, Esq., as attorney for the Receivers, be [37] and they are hereby confirmed and approved; and it is further

Five. ORDERED, ADJUDGED AND DECREED that A. F. Lieurance may continue to sign all checks for both Receivers on the bank account of the Receivers, and that his sole signature shall be sufficient for that purpose; and it is further

Six. ORDERED, ADJUDGED AND DECREED that said Receivers, in purchasing merchandise, may purchase all such merchandise in the open market and for such prices as to the Receivers may seem just and reasonable; and it is further

Seven. ORDERED, ADJUDGED AND DECREED that the Receivers be and they are hereby granted permission to apply at the foot of this decree for such other and further and additional relief as to the Court may seem just and proper in the premises.

Dated at San Francisco, August 9th, 1926.

A. F. ST. SURE,
United States District *Court* Judge.

[Endorsed]: Filed August 9, 1928. [38]

(Title of Court and Cause.)

STIPULATION AND AGREEMENT BETWEEN RECEIVER AND CERTAIN CREDITORS THAT THOSE CREDITORS' PROOFS OF DEBT FILED IN THE NEW YORK PROCEEDING ARE SUFFICIENT PROOFS IN CALIFORNIA PROCEEDING.

In the above-entitled proceeding it is hereby

stipulated and agreed by and between A. F. Lieurance, one of the Receivers herein, and the creditors of said R. A. Pilcher Co., whose names appear in a list of creditors hereto attached marked Exhibit "A" and made a part hereof, that the proofs of debt or verified claims of the aforesaid creditors heretofore proved and filed in the original proceeding in New York City entitled: United States District Court, Southern District of New York. Sidney Gilson, Herman Avrutine and Samuel Avrutine, Copartners Engaged in Business as National Garment Co., Complainants vs. R. A. Pilcher Co., Inc., Defendant. In Equity—No. 37—146, may be accepted as sufficient proofs of said debts or claims in the above-entitled proceeding or ancillary proceeding now pending in the United States District Courts, in and for the States of California, Oregon, and Washington, and particularly sufficient proofs of said claims or debts under the notice to creditors given by said Receivers to present or file claims as ordered by the United States District Court, for the District of California, copy of which notice is hereto annexed marked Exhibit "B" and made a part hereof;

It is further stipulated and agreed that no further or direct presentation or filing of the aforesaid creditors' claims shall be necessary in the aforesaid United States [39] District Courts of California, Oregon and Washington, but that the filing of this stipulation or agreement with respect to the aforesaid claims shall be conceded as meeting all

of the requirements of said notice to creditors, copy of which as aforesaid is attached hereto, marked Exhibit "B" and made a part hereof.

A. F. LIEURANCE,
Receiver.

EDWARD R. ELIASSEN,
Attorney for Said Receiver.

JOSEPH KIRK,
Attorney for Aforesaid Creditors. [40]

EXHIBIT "A."

LIST OF CREDITORS WHOSE CLAIMS OR PROOFS OF DEBT HAVE BEEN FILED BY BOARD OF TRADE OF SAN FRANCISCO IN THE RECEIVERSHIP PROCEEDING PENDING IN NEW YORK CITY—IN RE R. A. PILCHER & CO.,

Walton N. Moore Dry Goods Co.	$29316.07
J. H. Newbauer & Co.	7150.88
G. W. Reynolds Co.	3772.82
L. Dinkelspiel Co.	2460.71
Belding Bros. & Co.	1735.13
E. J. Feisel Co.	1569.64
Blair Raas Co.	1768.71
Standard Hat Co.	1573.93
M. R. Fleischman & Co.	453.91
J. B. Crowley	407.12
Muller & Raas Co.	378.65
Kuh Bros. Inc.	372.34
W. A. Genesy & Co.	306.88
Edmund Loewy Co.	295.25

Morris & Co.	254.28
C. Benedict Mfg. Co. (Ever Ready Rubber ProCo)	242 16
Moline Miller Co.	475.44
Barnard Hirsch Co.	104.18
Williams Marvin Co.	97.02
Zellerbach Paper Co.	26.28
M. J. Brandenstein & Co.	37.75
Andrew A. Jacob & Co.	36.00
Hart Silk Co.	29.09
Frederick Weingarten Co.	25.55
L. Samter & Sons	18.28
Simon E. Davis & Co.	13.45
The Sidley Co.	8.25
Hills Bros.	340.06
Napatan Shoe Co.	217.20
United States Rubber Co.	521.80
G. C. Hall & Son	60.89
A. Crocker & Co.	158.35
Eloesser Heynemann Co.	206.36
Goldstone Bros.	198.31
Hedges Buck Co.	190.00
Cluett, Peabody & Co.	288.86
Proctor & Gamble Distributing Co.	178.60
Everwear Mfg. Co.	160.06
Nippon Dry Goods Co.	176.37
Pacific Manifolding Book Co.	142.34
Levi Strauss & Co.	127.75
D. F. DeBernardi & Co.	123.05
American Biscuit Co.	118.30
Eastman Gibbens Co.	363.47
S. H. Frank & Co.	4.32

Western Meat Co.	259.76
Mangrum & Otter, Inc.	31.35
Clayburgh Bros.	2164.67
Sperry Flour Co.	215.91
Sigmmund Eisner Co.	204.23
Bell Hat & Frame Co.	790.66
Everite Hat Mfg Co.	3092.50
Ideal Hat & Novelty Co.	2108.68
Provident Hat Co.	360.50
Sunshine Mfg. Co.	75.00

[41]

EXHIBIT "B."

(Title of Court and Cause.)

PLEASE TAKE NOTICE, that pursuant to an order made in the above-entitled suit, dated June 9th, 1926, all creditors are directed to file with the Receivers within ninety (90) days from the date thereof, at the place designated by them, to wit, the office of Edward R. Eliassen, 1203 Central Bank Building, City of Oakland, County of Alameda, State of California, a duly sworn statement of all and any such claims as the creditors may have or assert against the above-named defendant, and such statement shall be verified before any officer authorized to administer oaths by the laws of the State where said claim is verified, and such statement of claim shall, where the same is evidenced by a written instrument have such written instrument attached thereto.

PLEASE TAKE FURTHER NOTICE, that by said order, dated June 9th, 1926, all creditors who

shall fail to file their claim within ninety (90) days from and after June 9, 1926, shall be debarred from any share of, in or to the properties of the defendant and shall not be entitled to receiver any share thereof, or the proceeds thereof.

Dated: Oakland, California, August 7th, 1926.

ARTHUR F. GOTTHOLD,
A. F. LIEURANCE,
Receivers of R. A. Pilcher Co. Inc.
EDWARD R. ELIASSEN,
Attorney for Receivers, 1203 Central Bank Building, Oakland, California.

[Endorsed]: Filed Dec. 10, 1926. [42]

(Title of Court and Cause.)

ORDER THAT PROOFS OF DEBT (ENUMERATED) FILED IN NEW YORK PROCEEDING ARE SUFFICIENT PROOFS IN CALIFORNIA PROCEEDING.

Upon reading and filing the stipulation and agreement by and between A. F. Lieurance, one of the Receivers herein, and certain creditors of said R. A. Pilcher Co. whose names appear in a list attached hereto, marked Exhibit "A" and made a part hereof,

IT IS HEREBY ORDERED, that the proofs of debt or verified claims of the aforesaid creditors, heretofore proved and filed in the original proceeding in New York City entitled: United States District Court Southern District of New York,

Sidney Gilson, Herman Avrutine and Samuel Avrutine, Copartners Engaged in Business as National Garment Co., Complainants, vs. R. A. Pilcher Co., Inc., Defendant. In Equity—No. 37–146, are sufficient proofs of said debts or claims in the above-entitled proceeding or ancillary proceeding now pending in the United States District Courts, in and for the States of California, Oregon and Washington, and particularly are sufficient proofs of said claims or debts under the notice to creditors given by said Receivers to present or file claims as ordered by the United States District Court, for the District of California, copy of which notice is hereto annexed marked Exhibit "B" and made a part hereof;

AND IT IS FURTHER HEREBY ORDERED, that no other or direct presentation or filing of the aforesaid creditors' claims shall be necessary in the aforesaid United States [43] District Courts of California, Oregon and Washington, and that the filing of the stipulation and agreement herein referred to with respect to the aforesaid claims, complies with all the requirements of said notice to creditors, copy of which as aforesaid is attached hereto, marked Exhibit "B" and made a part hereof.

ST. SURE,
Judge. [44]

EXHIBIT "A."

LIST OF CREDITORS WHOSE CLAIMS OR PROOFS OF DEBT HAVE BEEN FILED BY BOARD OF TRADE OF SAN FRANCISCO IN THE RECEIVERSHIP PROCEEDING PENDING IN NEW YORK CITY—IN RE R. A. PILCHER & CO.

Walton N. Moore Dry Goods Co.	$29316.07
J. H. Newbauer & Co.	7150.88
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Belding Bros. & Co.	1735.13
E. J. Feisel Co.	1569.64
Blair Raas Co.	1768.71
Standard Hat Co.	1573.93
M. R. Fleischman & Co.	453.91
J. B. Crowley	407.12
Muller & Raas Co.	378.65
Kuh Bros. Inc.	372.34
W. A. Genesy & Co.	306.88
Edmund Loewy Co.	295.25
Morris & Co.	254.28
C. Benedict Mfg. Co. (Ever Ready Rubber Prod. Co.)	242.16
Moline Miller Co.	475.44
Barnard Hirsch Co.	104.18
Williams Marvin Co.	97.02
Zellerbach Paper Co.	26.28
M. J. Brandenstein & Co.	37.75
Andrew A. Jacobs & Co.	36.00

Hart Silk Co.	29.09
Frederick Weingarten Co.	25.55
L. Samter & Sons	18.28
Simon E. Davis & Co	13.45
The Sidley Co.	8.25
Hills Bros.	340.06
Napatan Shoe Co.	217.20
United States Rubber Co.	521.80
G. C. Hall & Son	60.89
A. Crocker & Co.	158.35
Eloesser Heynemann Co.	206.36
Goldstone Bros.	198.31
Hedges Buck Co.	190.00
Cluett, Peabody & Co.	288.86
Procter & Gamble Distributing Co.	178.60
Everwear Mfg. Co.	160.06
Nippon Dry Goods Co.	176.37
Pacific Manifolding Book Co.	142.34
Levi Strauss & Co.	127.75
D. F. DeBernardi & Co.	123.05
American Biscuit Co.	118.30
Eastman Gibbens Co.	363.47
S. H. Frank & Co.	4.32
Western Meat Co.	259.76
Mangrum & Otter, Inc.	31.35
Clayburgh Bros.	2164.67
Sperry Flour Co.	215.91
Signmund Eisner Co.	204.23
Bell Hat & Frame Co.	790.66
Everite Hat Mfg. Co.	3092.50
Ideal Hat & Novelty Co.	2108.68

Provident Hat Co.	360.50
Sunshine Mfg. Co.	75.00

[45]

EXHIBIT "B."

(Title of Court and Cause.)

PLEASE TAKE NOTICE, that pursuant to an order made in the above-entitled suit, dated June 9th, 1926, all creditors are directed to file with the Receivers within ninety (90) days from the date thereof, at the place designated by them, to wit, the office of Edward R. Eliassen, 1203 Central Bank Building, City of Oakland, County of Alameda, State of California, a duly sworn statement of all and any such claims as the creditors may have or assert against the above-named defendant and such statement shall be verified before any officer authorized to administer oaths by the Laws of the State where said claim is verified, and such statement of claim shall, where the same is evidenced by a written instrument, have such written instrument attached thereto.

PLEASE TAKE FURTHER NOTICE, that by said order dated June 9th, 1926, all creditors who shall fail to file their claims, within ninety (90) days from and after June 9, 1926, shall be debarred from any share of, in or to the properties of the defendant and shall not be entitled to receive any share thereof, or the proceedings thereof.

Dated: Oakland, California, August 7th, 1926.

ARTHUR F. GOTTHOLD,
A. F. LIEURANCE,
Receivers of R. A. Pilcher Co., Inc.
EDWARD R. ELIASSEN,
Attorney for Receivers, 1203 Central Bank Building, Oakland, California.

Filed December 10, 1926. [46]

(Title of Court and Cause.)

ORDER AUTHORIZING CERTAIN PAYMENTS TO CREDITORS, ETC.

This cause having duly come on to be heard this ninth day of December, 1926, on the report and petition of the Receivers herein; and after hearing Edward R. Eliassen, Esq., the attorney for the Receivers; and good cause appearing therefor; now on motion of Edward R. Eliassen, Esq., the said attorney for the Receivers;

IT IS HEREBY ORDERED AND DECREED as follows:

I.

That all debts and claims entitled to priority for which proofs of claim have been filed, where such proofs of claim are necessary, be paid in full. If the Receivers doubt the validity of any priority claims filed, the validity of such claims will be determined in the manner hereinafter set forth.

II.

That a first dividend of 40% be declared and

paid to all creditors whose claims have been filed and allowed by the Receivers herein and the Receivers are hereby authorized to accept proofs of claim in due form from creditors whose claims appear on the books of the defendant to be valid, notwithstanding that the time limit for such filing has expired. In this connection, the Receivers are authorized and empowered to notify such creditors whose claims have not yet been filed that unless they are received by the Receivers before such date or time as the Receivers may fix for the purpose; no consideration will be given to their claims and the said claims will be barred. [47]

III.

Frank O. Nebeker is hereby appointed Special Master to hear the objections filed by the Receivers to any and all claims filed or that may hereafter be filed, and to take the testimony offered by the parties and to report the same to this Court with his opinion thereon.

IV.

That Edward R. Eliassen, Esq., attorney for the Receivers, be paid immediately the sum of Ten Thousand Dollars, to apply on account of services rendered.

V.

That the sum of Ten Thousand Dollars be paid to apply on account of Receivers' services; to be divided 75% thereof to Receiver A. F. Lieurance and 25% thereof to Arthur F. Gotthold, his co-receiver.

Dated: December 10th, 1926.

A. F. ST. SURE,
Judge United States District Court.

[Endorsed]: Filed December 10, 1926. [48]

(Title of Court and Cause.)

ORDER AMENDING ORDER DATED DECEMBER 10, 1926.

A stipulation having been entered into and filed herein between A. F. Lieurance, Receiver, and Edward R. Eliassen, Esq., attorney for the Receivers in the above-entitled proceeding, and the Creditors' Committee representing eastern creditors of the R. A. Pilcher Co., Inc., and the Creditors' Committee representing the western creditors of the R. A. Pilcher Co., Inc., and Francis J. Heney, Esq., and Joseph Kirk, Esq., their attorneys, agreeing to a modification of that certain order made by the above-entitled court on December 10, 1926, so as to provide that the allowance to be paid to A. F. Lieurance, Receiver, on account, be reduced to $3,500.00, and the allowance on account to Edward R. Eliassen, attorney for the Receivers, be reduced to $5,500.00; and the said stipulation having been read and considered by the Court:

IT IS HEREBY ORDERED, that the aforementioned order of the above-entitled court dated December 10, 1926, be and it is hereby modified and amended as follows:

Paragraph numbered IV is hereby amended to read as follows:

"That Edward R. Eliassen, attorney for the Receivers, be paid immediately the sum of $5500.00 to apply on account of services."

Paragraph numbered V is hereby amended to read as follows:

"That the sum of $3500.00 be paid to Receiver A. F. Lieurance on account of his services."

Dated: May 20th, 1927.

ST. SURE,
Judge of the United States District Court.

[Endorsed]: Filed May 20, 1927. [49]

[Title of Court and Cause.]

RECEIVERS' REPORT ACCOMPANYING FINAL ACCOUNT.

To the Honorable A. F. St. Sure, Judge of the United States District Court, in and for the Northern District of California, Southern Division:

A. F. Lieurance and Arthur F. Gotthold, respectfully represent and report as follows, to wit:

That the said A. F. Lieurance and Arthur F. Gotthold were, by an order of the above-entitled court made on the 9th day of June, 1926, duly and regularly appointed as temporary Receivers of the above-named defendant company, and that on or about the 9th day of August, 1926, by an order

duly made and entered in the above-entitled proceeding, the said Receivers were made permanent Receivers of the said defendant Company and qualified as such, and that they ever since have been and now are the duly appointed, qualified and acting Receivers in equity of the above-named R. A. Pilcher Co., Inc., defendant.

That under and pursuant to the above-mentioned orders, Receiver Lieurance, on behalf of said Receivers, took charge and possession of the assets of the said defendant corporation situate within the Northern District of California, the District of Oregon and the Eastern and Western Districts of Washington. As heretofore reported, the assets within the Northern District of California consisted [50] of three merchandise stores and their contents, situate at Stockton, California; Oroville, California; and Turlock, California.

Receiver Gotthold, on behalf of the Receivers, took possession of the general office and its equipment located at New York City, New York.

That prior to said appointment of said Receivers, they, the said A. F. Lieurance and Arthur F. Gotthold, were by an order made by the United States District Court in and for the Southern District of New York, duly appointed as Receiver of the defendant corporation and that after the appointment in this jurisdiction of the said Receivers, they, the said A. F. Lieurance and Arthur F. Gotthold, were duly and regularly appointed Receivers of the defendant Company by the United States District Courts in and for the District of Oregon, the West-

Oroville and Turlock, and to operate the same and to purchase all necessary merchandise therefor from time to time and as needed, and authorizing them to do any and all other things in the maintenance and operation of the aforementioned business which, in the opinion of the said Receivers or either of them, may be deemed necessary or advisable. Similar orders [52] were made by the courts in Oregon and Washington jurisdictions in the above-entitled matter. And pursuant to such orders, the said Receivers, by Receiver A. F. Lieurance, made purchases for the purpose of balancing up the stocks, keeping the stores going, keeping up the sales, and otherwise maintaining the business and preserving the assets, and that purchases of merchandise were made during the administration as follows:

Stockton store	$ 5069.35
Oroville store	3069.05
Turlock store	6904.51
Total	$15042.91

These stores, under the direction of Receiver Lieurance, were kept open and the business conducted in an orderly manner. Merchandise sales were made as follows, to wit:

Stockton store	$34917.17
Oroville store	12233.77
Turlock store	29003.79
Total	$76154.73

That the only stores belonging to the defendant Company were the sixteen stores located in California, Oregon and Washington, although the principal office of the corporation was located at New York City. This New York office of the corporation was closed shortly after the institution of the Receivership.

After paying all the store expenses and all bills for merchandise, then due and received to date, and as a result of store operations and of sales of merchandise in the Western jurisdictions, the Receivers had on hand on the 31st day of August, 1926, the sum of $228,178.07.

At that time, Receiver Lieurance communicated with Coreceiver Gotthold and Messrs. McManus, Ernst & Ernst, attorneys for the Receivers in New York, informing them of the condition of the estate, and suggesting that if the business was to be carried on for an appreciable length of time, pending the refinancing of the business by the stockholders, that the greater part of the cash then on [53] hand would have to be expended for merchandise to supply the stores for the coming fall season. Receiver Gotthold and Attorney McManus, Ernst & Ernst in turn conferred with a number of large eastern creditors, and Receiver Lieurance conferred with a number of the larger western creditors, and it was found that the concensus of opinion among the creditors was that the business could not be refinanced, and that the cash then on hand should not be expended for merchandise to replenish the stocks in the stores for future operations, and that unless

the stockholders gave definite assurance that the business would be refinanced, or a satisfactory settlement made, the cash then on hand should be preserved for distribution among the creditors, together with the proceeds of the sale of the remainder of the property.

By appointment, Receiver Lieurance met Mr. J. C. Brownstone of New York, the largest stockholder of the defendant corporation, in Yellowstone Park, Wyoming, previous to August 5th, 1926, for the purpose of discussing the refinancing of the business. This conference did not result in the solution of this problem. Numerous conferences in this regard had with Mr. R. A. Pilcher, president of the corporation, failed to reveal that his efforts to refinance the business would be successful, and when this was definitely known, steps were immediately taken to reduce the assets to cash, through the sale of the stores.

Before offering these stores for sale, it was made known to the principal stockholders of the defendant corporation that in the opinion of the Receivers, the stores of the defendant Company could not be operated at a profit as a whole because of excessive fixed maintenance charges, high rents, etc.

Because of the premises, and pursuant to authority granted in that certain order dated August 9, 1926, the property of the defendant Company situate within the State of California was offered for sale. Due notice thereof was given in accordance with law and the order of the Court, and the said stores within the California [54] jurisdiction, to wit,

the Stockton store, Oroville store and the Turlock store, were duly sold, and the sales approved as shown by the order approving the same now on file in the above-entitled proceeding. These sales brought the sum of $41,000.

As already reported, the stores were sold as going concerns. The stores in the other Western jurisdictions, by authority of the other courts, were also sold in the same manner and by competitive bid. The gross amount received from the sale of the stores in all of the jurisdictions was and is the sum of $257,600. This sum, of course, does not include the sales of merchandise made over the counter during the course of the Receivership, aggregating the sum of $499,263.28.

The sale of the stores as going concerns resulted in yet another benefit. Most of the purchasers desired to retain the stores and their locations, and as a result, no claims have been presented by lessors under the leases. And as the time within which creditors were given an opportunity to present their claims is past, and no claims have been made by any of the lessors in the premises, the Receivership estate has been saved, in the opinion of the Receivers, from a large monetary liability.

By order of Court, the time within which creditors were required to file their claims with the Receivers has expired. And notice was given to all creditors whose claims had not yet been received by the Receivers, that unless their claims were presented and filed before March 1, 1927, any such claims would be barred. A number of creditors,

as shown by the books of the corporation, have failed to present their claims. It is desired, therefore, that this Court make its order in the premises forever barring the claims of such delinquent creditors. The following is a list of such creditors whose names appear on the books of the defendant corporation and who have failed to file their claims, viz:

Name of Creditor.	Amount of Claim.
Addressograph Sales Company	$ 1.17
Bassere Textile Cleaning House	87.75
[55]	
Bornson, Harry B.	29.76
California Cap Mfg. Company	8.75
Eastman, Howard	5.06
Jones Electric Company	5.95
Kass, Ben	29.72
Klamath News	1.50
Logan Studios	3.00
McShine Company	3.40
Messbaum Herzog Company	25.00
Northwestern Hdwe Co	4.02
Perberg & Greenberg	23.25
Rowell Brown & Company	2.56
Shill Bros. & Meadows	.86
Shoe Dealer's Service Co.	4.00
Smith, L. C. Co.	.75
Turner, J. H.	3.05
	$239.55

The Receivers have had presented to them and have considered a total of 647 claims (638 general

claims and 9 preferred claims), aggregating $751,-860.09, as follows, viz:

$ 5,816.34—total amount allowed as preferred;
746,043.75—total amount claimed as general;
718,794.12—total amount allowed as general;
724,610.46—total amount allowed as preferred and general.

The difference in the amounts claimed and the amount allowed being $27,249.63, as adjusted; practically all of this reduction having been effected in the western jurisdictions.

For the purpose of expediting the checking up of claims and considering the validity thereof, and as all the books and vouchers of the defendant Company were at its New York office, in New York City, Phillip A. Hershey, of the firm of Phillip A. Hershey & Co., Accountants, retained by the Receivers in these western jurisdictions, was sent to New York City by permission of this Court.

He caused copies to be made of the necessary books and brought back with him into this jurisdiction all of the claims of the creditors that had been filed and all memoranda necessary for the purpose of properly considering and acting upon the claims of [56] the creditors. In this connection, it might be well to state that since the appointment of the Receivers in the ancillary jurisdictions, Mr. A. F. Lieurance has maintained an office on their behalf at Room 1201 Central Bank Building, Oakland, California. All of the business of the Receivers in the western jurisdictions and all of the

business of the stores during this Receivership has been handled from this office by Mr. Lieurance.

All dividends which are hereafter mentioned have been paid from this office, as shown by the account. And as claims of creditors have been presented within the various jurisdictions, it was deemed advisable to get them all together within this jurisdiction and to handle and pay them from this office. It is to be noted that all creditors, regardless of geographic location, have shared alike in the distribution of dividends. A complete list of the claims presented has been prepared and is filed herewith. The list, it will be observed, not only shows the amount of the claims presented, but also shows the amounts allowed or adjusted. Some of the claims were allowed as preferred claims. Others, as partially preferred; and others as general. Disputed claims have been settled, either by stipulation or by the Court order based upon the findings and report of the Special Master appointed for the purpose of taking testimony and reporting on disputed claims.

The amount of the general claims, therefore, is now the sum of $718,794.12. The preferred claims aggregate $5,816.34, as finally adjusted and allowed. The total of all claims, general and preferred, adjusted and allowed, is $724,610.46.

In this jurisdiction, Hon. Frank O. Nebeker was by an order of the above-entitled court appointed as Special Master. He has reported to this Court upon the claims of the following, viz:

John A. Schindler	$ 1,062.67
M. M. Berg	6,150.00
Eastman-Gibbons Company	338.25
Dave Matthews	500.00
Sherman & Wise	238.70
Weber Showcase & Fixture Co.	32,764.21

[57]

Full hearings were had before Judge Frank O. Nebeker in the matters of the said claims and the Special Master recommended as follows, viz:

(a) That the claim of John A. Schindler be rejected as a preferred claim, and that it be allowed as a general claim in the sum of $1,062.67.

(b) That the claim of Sherman & Wise (C. V. Sherman and R. G. Wise) for $238.70, then pending in suit at Stockton, California, be rejected as a preferred claim and allowed as a general claim.

(c) That the claim of Eastman-Gibbons Company be allowed as a general claim in the sum of $263.25.

(d) That the claim of the Weber Showcase & Fixture Co. be approved as a general claim in the sum of $16,871.61.

(e) That the claim of Dave Matthews be denied.

(f) That the claim of M. M. Berg be settled as follows:

That one of the items of said claim, to wit, item of $4,200 claimed as damages, be denied.

That the item of $200, claimed as damages to an awning be accepted as a general claim.

That item of $500 for painting and staining the interior of the building, be denied.

That item of $375 claimed for cost of removal of vault be denied.

That item of $500, the cost of painting exterior of building be allowed as a general claim.

That item of $225 claimed for damages because of discontinuance and cut-out of burglar alarm, be denied.

That item of $150 claimed as rent or storage, be denied.

We are informed that in the New York jurisdiction, there are certain stockholders' claims, aggregating about $9,000 which are in dispute and upon which hearings have been had before a Special Master appointed there for the purpose. So far as we know, there has not yet been any adjudication upon such claims.

The claims allowed as preferred claims have been paid in full. And pursuant to an order of the above-entitled court made on or about the 10th day of December, 1926, a dividend of forty per cent (40%) has been paid on all general claims allowed. Since [58] said time and on or about the 11th day of May, 1927, an order was made by the above-entitled court authorizing the payment of an additional dividend, amounting to ten per cent (10%).

This dividend also has been paid.

Both of these dividends, as already suggested, were paid from the Oakland office of Receiver A. F. Lieurance.

Because the creditors of the defendant corporation are scattered throughout the West, and also the eastern portion of the United States, and for their information in each of the jurisdictions, it has been deemed advisable by the Receivers and their accountants to file in each jurisdiction a complete account of all their transactions including, of course, an itemized account of all moneys received and disbursed by them within the jurisdiction of the above-entitled court.

On December 10, 1926, the first dividend of forty per cent (40%), as suggested above, was authorized by an order of the above-entitled court. Pursuant to the same order, an interim allowance on account was made to A. F. Lieurance in the sum of $7,500 on account of his services; to Arthur F. Gotthold, as Receiver, in the sum of $2,500, and to Edward R. Eliassen, attorney for the Receivers, in the sum of $10,000 on account of attorney's fees.

As this order was obtained and the allowances made without notice to all the creditors, some of the creditors expressed dissatisfaction and a desire to be heard in the matter of the fixation of the fees of the Receivers and their attorney, and Mr. Lieurance and Mr. Eliassen, thereafter, in the interests of harmony, entered into a stipulation in this jurisdiction, agreeing to a reduction in the amount of such allowances on account; the said allowance on account to Mr. Lieurance to be re-

duced to $3,500, and to Mr. Eliassen the said allowance to be reduced to $5,500, upon the stipulation with the Eastern and Western Creditors' Committees and their attorneys that such allowances were not to be [59] further reduced; that the above-entitled court shall have the exclusive right to fix the compensation of the Receiver, A. F. Lieurance, and Edward R. Eliassen, attorney for the Receivers in the above-entitled proceeding in this jurisdiction; that the final fixation of the fees of Mr. Lieurance and Mr. Eliassen shall be made at the time of the hearing on the final account of the Receivers herein and that notice of the time and place of such hearing shall be given to all of the known creditors of the defendant Company by mailing notices to them at their last known addresses, at least thirty (30) days before such hearing, and that no further or other fixation of their respective fees shall be made by the said Court in the meantime.

Mr. Arthur F. Gotthold has agreed to waive any fees to which he may be entitled in the western jurisdiction. He resides in New York and it has been agreed that he shall be entitled to all the fees allowed the Receivers in the New York jurisdiction. Mr. Lieurance has done all of the work and performed all of the duties of the Receivers in the western jurisdictions. He has been, for a great number of years, engaged in the chain store business. He has had wide experience therein and ever since his appointment as Receiver herein has neglected his own affairs and devoted his time and

effort to the administration of the affairs of this estate. His administration, we respectfully submit, has been an able one. The results show this. And we believe they warrant the payment to him of such fees as will amply compensate him for his time and effort and the results obtained.

We recommend also that Mr. Edward Eliassen, as attorney for the Receivers in the western jurisdictions, be allowed a reasonable fee in this jurisdiction. He has done a large amount of legal work. This work has taken him away from his office a considerable portion of the time. He has had to forego and neglect other professional business. And in the matter of the fixation of his fees we feel that this will be considered. [60]

WHEREFORE: The Receivers pray for an order of the above-entitled court as follows, to wit:

Settling and confirming the final account of the Receivers and confirming this report; fixing the fees and the compensation of A. F. Lieurance, as Receiver, and of Edward R. Eliassen, as attorney for the Receivers; declaring barred all claims of creditors not presented or filed prior to March 1st, 1927; permitting the Receivers after the payments of all attorney's fees and Receivers' fees in the western jurisdiction and the payments of all charges and expenses in connection with the winding up of the affairs of the Receivers in the western jurisdiction, to forward any surplus moneys then in hand to Receiver Arthur F. Gotthold, at New York, for use in the final closing of the estate and proceeding in the New York jurisdiction; and for such other

or further order or relief in the premises as to the Court may seem meet and just and equitable.

ARTHUR F. GOTTHOLD.
A. F. LIEURANCE. [61]

State of California,
County of Alameda,—ss.

A. F. Lieurance, being first duly sworn, deposes and says:

That he is one of the Receivers of the R. A. Pilcher Co., Inc., and that he makes this affidavit on behalf of the Receivers Arthur F. Gotthold and A. F. Lieurance; that he has read and signed the foregoing report and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters that he believes it to be true.

A. F. LIEURANCE.

Subscribed and sworn to before me this 19 day of May, 1927.

[Seal] EDWARD R. ELIASSEN,
Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed May 19, 1927. [62]

[Title of Court and Cause.]

PETITION OF RECEIVERS ARTHUR F. GOTTHOLD AND A. F. LIEURANCE FOR SETTLEMENT AND APPROVAL OF THEIR FINAL ACCOUNT AND REPORT, AND FOR AN ORDER FINALLY FIXING THE FEES AND COMPENSATION OF A. F. LIEURANCE AS RECEIVER AND EDWARD R. ELIASSEN AS ATTORNEY FOR RECEIVERS.

To the Honorable A. F. ST. SURE, Judge of the United States District Court in and for the Northern District of California, Southern Division:

The petition of Arthur F. Gotthold and A. F. Lieurance respectfully represents as follows, to wit:

That they have been and now are the duly appointed, qualified and acting Receivers of the R. A. Pilcher Co., Inc.

That they have filed herewith their final Account and Report of their administration for allowance and approval.

That the said account contains a true and correct statement of all moneys received and disbursed by the Receivers in this jurisdiction, as well as all moneys received and disbursed by them in the jurisdictions of Oregon and Washington.

That the administration of the said Receivers and the estate of the said R. A. Pilcher Co., Inc., is ready to be closed as soon as the compensation

and fees of the Receiver A. F. Lieurance and of Edward R. Eliassen, attorney for the Receivers, has been finally fixed. In this connection, it is suggested that Arthur F. Gotthold, Receiver, makes no request for any allowance [63] to him on account of Receiver's fees in this, or in any western jurisdiction, it having been agreed that Receiver A. F. Lieurance has done and performed all the work and duties of the Receivers within this and the other western jurisdictions and that he shall be entitled to all fees of the Receivers in the western jurisdictions and that said Arthur F. Gotthold shall be entitled to all fees allowed the Receivers in the New York jurisdiction.

That because the allowances heretofore made to the Receivers and to their attorney in the western jurisdictions were made upon *ex parte* application, and because some of the creditors expressed dissatisfaction and a desire to be heard in the matter of the fixation of the fees of the Receivers and their attorney, the Receiver, A. F. Lieurance, and the attorney for the Receivers, Edward R. Eliassen, thereafter in the interests of harmony, entered into a stipulation in this jurisdiction agreeing to a reduction in the amount of such allowances and consented in this jurisdiction to a reduction in the amount of the allowance on acount as follows: Receiver A. F. Lieurance consented to a reduction to $3,500 on account, and Edward R. Eliassen consented to a reduction to $5,500 on account.

That said consent is contained in a stipulation entered into with the representative of the western

and eastern Creditors' Committees, and their attorneys, and it is therein stipulated that the above-entitled court shall have the exclusive right to fix the compensation and fees of the said Receiver and of Edward R. Eliassen, attorney for the Receivers in this jurisdiction, after at least thirty days' notice of the time and place of the hearing on the final account of the Receivers.

That in the opinion of Receiver A. F. Lieurance and attorney Edward R. Eliassen, the value of the services rendered by the said Receiver and by the attorney is greatly in excess of the amount of the allowances upon account, and that an order [64] should be made by the above-entitled court finally fixing the fees and compensation of the said Receiver and the said attorney for services rendered in this jurisdiction, in such sums as will reasonably compensate them for their services, and as to the Court may seem fair and proper in the premises.

WHEREFORE: Petitioners pray for an order of the above-entitled court allowing and approving the final account and report of the receivers and fixing the compensation and fees of Receiver Lieurance; for an order fixing the fees and compensation of Edward R. Eliassen, attorney for the Receivers; barring all creditors who had not, prior to March 1, 1927, presented or filed their claims; and for an order of the above-entitled court authorizing the Receivers, after the payments of all costs and charges and expenses and allowances on account of fees and compensation of the Receiver and the attorney for the Receivers in the western jurisdic-

tions, to forward any surplus moneys to Receiver Arthur F. Gotthold, New York City, to be used in finally closing the administration of the Receivers in the New York jurisdiction; and for such other and further order or orders in the premises as may be meet and proper.

ARTHUR F. GOTTHOLD,
A. F. LIEURANCE,

Receivers of R. A. Pilcher Co., Inc., Petitioners.
EDWARD R. ELIASSEN,
Attorney for Receivers. [65]

State of California,
County of Alameda,—ss.

A. F. Lieurance, being first duly sworn, deposes and says:

That he is one of the Receivers of the R. A. Pilcher Co. Inc., and one of the petitioners named in the foregoing Petition; that he has read the said petition and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and as to those matters that he believes it to be true.

A. F. LIEURANCE.

Subscribed and sworn to before me this 19 day of May, 1927.

[Seal] EDWARD R. ELIASSEN,
Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed May 19, 1927. [66]

[Title of Court and Cause.]

OBJECTIONS AND EXCEPTIONS TO FINAL ACCOUNT AND REPORT OF THE RECEIVERS, ALSO TO THE PETITION FOR ALLOWANCE OF FURTHER FEES AND COMPENSATION TO RECEIVER LIEURANCE OR TO EDWARD R. ELIASSEN, ATTORNEY FOR THE RECEIVERS.

The undersigned, as creditors of the above-named defendant, R. A. Pilcher Co. Inc., in the respective sums herein stated, to wit:

Walton N. Moore Dry Goods Co.	$29,316.07
J. H. Newbauer & Co.	7,150.88
G. W. Reynolds Co. Inc.	3,772.82
L. Dinkelspiel Co. Inc	2,460.71

on their own behalf, and on behalf of fifty-five other California creditors of said defendant whose claims aggregate $65,809.12, and also on behalf and for the benefit of the New York committee of the eastern creditors of said defendant, and which committee represents creditors whose claims aggregate more than three-fourths of the total indebtedness of said defendant, and also on behalf and for the benefit of all of the creditors of the defendant generally, hereby respectfully and earnestly object and except to the account of the Receivers, and also to the report of said Receivers accompanying said final account filed [67] herein, and also to the petition for the allowance of further fees and compensation to Receiver Lieurance and Edward R.

Eliassen, attorney for the Receivers, in the particulars and upon the grounds hereinafter set forth. The final account and report of the receivers, the petition for the allowance and approval thereof and the petition for the allowance of further fees and compensation in favor of Receiver Lieurance and Attorney Eliassen contain virtually the same statements of fact, and the report and petitions each ask for the same orders and action by the Court; therefore, the undersigned, hereinafter styled the "objectors and exceptors," respectfully ask leave to present their objections and exceptions to such final account, final report, and petitions, jointly, and in one document.

I.

OBJECTIONS AND EXCEPTIONS TO THE FINAL ACCOUNT AND FINAL REPORT.

1. General Objections and Exceptions to Both Final Account and Final Report.

(a) The objectors and exceptors are credibly informed and believe, and therefore state the fact to be, that Arthur F. Gotthold, one of the Receivers herein, has never authorized the making or filing of said Receivers' final account and final report, or either thereof, in the form in which they were filed; that he has never concurred therein, and does not now concur therein, as to the matters hereinafter set forth; on the contrary, that he objects and excepts to such final account, final report and petitions for the allowance of further fees and com-

pensation in favor of Receiver Lieurance and Attorney Eliassen, in the particulars and as to the items hereinafter set forth, and that his grounds for such objections and exceptions include the grounds hereinafter set forth. [68]

(b) The objectors and exceptors are further credibly informed and believe, and therefore state the fact to be, that Receiver Gotthold has never authorized nor approved the expenditure or the payment of the item "Dec. 31 (1926) Phillip A. Hershey & Co. Accountants fees $5900.00," which appears at line 14 on page 599, Final Account; but on the contrary he specifically objects and excepts thereto, and repudiates responsibility therefor.

(c) The objectors and exceptors are further credibly informed and believe and therefore state the fact to be, that Receiver Gotthold never has concurred and does not now concur, in the statements set forth in said purported joint report, purporting to explain the manner in which Receiver Lieurance and Attorney Eliassen procured "interim" allowances, the nature of the objections thereto interposed by the creditors and the circumstances concerning the reduction of such allowances; and that Receiver Gotthold never has concurred and does not now concur, in the purported joint recommendation of the allowance of further fees and compensation in favor of Receiver Lieurance and Attorney Eliassen; on the contrary, that he specifically repudiates such purported statements, explanations and recommendations, and objects and excepts thereto, upon

the grounds hereinafter set forth by these objectors and exceptors.

2. Specific Objections and Exceptions to Final Account.

The objectors and exceptors object and except to the item of disbursement appearing at line 14, on page 599, to wit: "Dec. 31 (1926) Phillip A. Hershey & Co. Accountants fees $5900.00," upon the following grounds:

(a) The objectors and exceptors are credibly informed and believe, and therefore state the fact to be, that all of the services performed by Phillip A. Hershey & Co. in the premises, were rendered under a contract between Receiver Lieurance and [69] Phillip A. Hershey & Co. by the terms of which the compensation for such services should be the sum of $300.00 per month, and no more; and the final account shows that (apparently pursuant to such contract) Phillip A. Hershey & Co. were paid the sum of $300.00 each month, including the month of December, 1926, excepting that the monthly payment made to them in August, 1926, was for the sum of $350.00 instead of the sum of $300.00, with no explanation as to the excess payment of $50.00.

(b) The objectors and exceptors are further credibly informed and believe and therefore state the fact to be, that at the time of the employment of Phillip A. Hershey & Co., Receiver Lieurance purported to state to a representative of the creditors of the defendant, the divers items of general expense which would be incurred in the administration

of the ancillary receiverships in the four western jurisdictions; and therein and thereby Receiver Lieurance stated and represented that the sole cost of the services of Phillip A. Hershey & Co. would be the sum of $300.00 per month, as above stated; and immediately thereafter such statement and representation by Receiver Lieurance were reported to the committees of the creditors of the defendant, and, in reliance thereupon, the employment of Phillip A. Hershey & Co. upon such terms was tacitly acquiesced in, and no objections thereto were made or interposed by any of the creditors.

(c) The services rendered by Phillip A. Hershey & Co. were and are of a reasonable value not exceeding said sum of $300.00 per month, and were fully and adequately compensated for and paid prior to the payment of said additional sum of $5,900.00 on December 31, 1926, as to which this objection and exception is interposed.

3. Specific Objections and Exceptions to Final Report.

(a) The objectors and exceptors object and except to the [70] statements set forth in the final report concerning the circumstances under which "interim" or temporary allowances were heretofore made in favor of Receiver Lieurance and Attorney Eliassen; and allege that the true facts in the premises are as hereinafter set forth in the objections and exceptions to the allowance of any further fees or compensation in favor of Receiver Lieurance or Attorney Eliassen, and not otherwise.

(b) The objectors and exceptors object and except to the statement in the final report that Receiver Lieurance, "ever since his appointment as Receiver herein has neglected his own affairs and devoted his time and effort to the administration of this estate"; and the objectors and exceptors deny that such statement is true, in substance or otherwise, but that the true facts in the premises are as hereinafter set forth, and not otherwise.

II.

OBJECTIONS AND EXCEPTIONS TO THE PETITION FOR THE ALLOWANCE OF FURTHER FEES AND COMPENSATION TO RECEIVER LIEURANCE AND ATTORNEY ELIASSEN.

1. As to Both Receiver Lieurance and Attorney Eliassen.

By the final report and the petition for the allowance of further fees and compensation in favor of Receiver Lieurance and Attorney Eliassen, it is represented and stated, in substance, that after the "interim" allowance by the above-named court, on December 10, 1925, of the sum of $7,500.00 to Receiver Lieurance on account of his services together with the sum of $2,500.00 to Receiver Gotthold, and the sum of $10,000.00 to Attorney Eliassen on account of attorney's fees, the only objection made thereto by any of the creditors was that "some of the creditors expressed dissatisfaction and a desire to be heard in the matter of the fixation of the fees of the Receivers and their attorneys," and that

the only ground for this objection was that the order for the "interim" allowances "was obtained and the allowances [71] made without notice to *all* the creditors," and that thereafter Receiver Lieurance and Attorney Eliassen, "in the interests of harmony entered into a stipulation in this jurisdiction, agreeing to a reduction in the amount of such allowances on account," and that such stipulation provided "that the above-entitled court shall have the exclusive right to fix the compensation" of Receiver Lieurance and Attorney Eliassen "in this jurisdiction"; thereby making it appear, and intending to make it appear, that such allowances were made *with* notice to *some* of the creditors, and that the only objection urged against such allowances was upon the ground that they were made without notice to *all* of the creditors, and that it was contemplated by the creditors that further allowances should be made, but that they should not be made without notice to all of the creditors of the applications therefor, also, that Receiver Lieurance and Attorney Eliassen voluntarily agreed to a reduction in the amount of such allowances as soon as they learned that "some of the creditors expressed dissatisfaction and a desire to be heard in the matter of the fixation of the fees of the Receiver and their attorneys"; whereas, the objectors and exceptors represent and state to the Court that such representations and statements do not correctly convey to the Court the true facts in the premises, which are as hereinafter set forth, and not otherwise.

(a) On December 9, 1926, certain of the representatives of the western creditors received a telegram stating, in substance, that applications for temporary or interim allowances in favor of Receiver Gotthold in the sum of $10,000 and in favor of the eastern attorneys for the Receivers in the sum of $10,000 had been made in the original or parent receivership proceedings pending in the United States District Court for the Southern District of New York and stating that the Judge of such court had invited suggestions from the committee of the creditors, [72] and requesting the representatives of the western creditors to whom such telegram was addressed to see Receiver Lieurance and Attorney Eliassen and ascertain what their respective charges would be, and advise the New York committee of the eastern creditors of the results of such conference with Receiver Lieurance and Attorney Eliassen so that the same could be included in the recommendation to the Judge of the United States District Court for the Southern District of New York.

(b) Pursuant to the above-mentioned telegram and the request therein contained, a conference was held on December 9, 1926, between Receiver Lieurance, Attorney Eliassen, and certain representatives of the western creditors; and it was mutually agreed between all parties to such conference, in substance, that the allowances asked for by Receiver Gotthold and his attorneys were excessive; that the views of the members of the western creditors' committee should be ascertained and pre-

sented to the several courts respectively, before any action should be taken concerning any of the allowances to either of the Receivers or their attorneys respectively; that while the views of the members of the western creditors' committee were being obtained, Receiver Gotthold and his attorneys, together with the New York members of the eastern creditors' committee should be asked to request the Judge of the eastern jurisdiction to postpone action until all interested parties both east and west, could exchange views and agree upon the gross amounts to be asked for by the Receivers and their respective attorneys in all jurisdictions; and a telegram in accordance with this general understanding and agreement was drafted and agreed upon by Receiver Lieurance, Attorney Eliassen and the representatives of the western committee, and was transmitted to the chairman of the New York committee, such telegram being sent over the signature of Walton N. Moore, one of the representatives of the western committee who [73] participated in such conference.

(c) In violation of the arrangement and agreement entered into at the conference of December 9, 1926, hereinbefore mentioned, and without notice to, knowledge by or consent of any of the creditors of the defendant, or any of their representatives respectively, on December 10, 1926, Receiver Lieurance and Attorney Eliassen obtained, upon *ex parte* applications, allowances by the above named court, in favor of Receiver Lieurance (and Receiver Gotthold) in the sum of $10,000.00 and in favor of

Attorney Eliassen in the sum of $10,000.00; and immediately thereafter, and at divers times until and on December 16, 1926, and under the same general circumstances and conditions, obtained similar allowances in the other western jurisdictions, aggregating (with the allowances in this jurisdiction) the sum of $42,500.00 in favor of Receiver Lieurance (and Receiver Gotthold) and the sum of $27,500.00 in favor of Attorney Eliassen, being a gross total of such allowances in the sum of $70,000.

(d) None of the creditors had any notice or knowledge of any of such allowances until December 16, 1926, after all of them had been made, when the representatives of the western committee received information concerning the same and immediately communicated such information to the New York committee for the eastern creditors; and immediately all the creditors, and all of the several committees and representatives thereof, so far as known to the objectors and exceptors, vigorously protested against each and all of such allowances, not only upon the ground that the same were obtained without notice to any of the creditors but also upon the ground that they were obtained in flagrant violation of the understanding and agreement with Receiver Lieurance and Attorney Eliassen above mentioned, and upon the further ground that such allowances were grossly excessive, and Receiver Gotthold joined in such protest and the [74] above-mentioned grounds thereof.

(e) Thereafter, and on December 20, 1926, the above-mentioned representatives of the western

Creditors had a conference with Receiver Lieurance and Attorney Eliassen, at which conference the above-mentioned representatives of the western creditors, not only on behalf of the western creditors but on behalf of all of the creditors generally, protested against all of such allowances, and demanded of Receiver Lieurance and Attorney Eliassen that all of the orders for such allowances, respectively, be immediately vacated and set aside; in response to which, Receiver Lieurance and Attorney Eliassen promised to consider the matter, and return a definite answer on the following day, but they wholly failed to do so; whereupon, and on December 22, 1926, the representatives of the western committee again communicated with Attorney Eliassen upon the subject; and, notwithstanding the premises, Receiver Lieurance and Attorney Eliassen wholly neglected and refused to agree to the vacation of such orders of allowances, or to any modification thereof.

(g) Thereafter, and on December 29, 1926, Walton N. Moore, acting by and through his attorneys, presented to the Judge of the above-named court, a verified petition on behalf of the Walton N. Moore Dry Goods Co., one of the western creditors of the defendant in the sum of $29,316.07, and also on behalf of the other western creditors, and the eastern creditors, and the creditors generally, mentioned in the opening paragraph of these objections and exceptions; which petition accurately set forth the facts in the premises, asked that such orders of allowances be vacated, discharged and set aside;

and upon such petition, the attorneys for the petitioner therein made an informal motion for the issuance of an order to show cause why such petition should not be granted, addressed to Receiver Lieurance and Attorney Eliassen; but it was informally [75] suggested that before such order to show cause should be issued, such petition should be informally presented to Attorney Eliassen, to the end that the subject matter thereof might be discussed by the attorneys for Walton N. Moore and Attorney Eliassen, with a view to an amicable adjustment thereof, if the parties could agree thereto.

(h) Pursuant to the premises, and without formally filing such petition, or securing the issuance of any order to show cause thereon, later on said December 29, 1926, the attorneys for Walton N. Moore communicated with Attorney Eliassen, had an initial conference with him, delivered to him a copy of such petition, and thereafter negotiations were entered into and carried on from time to time until on or about April 15, 1927, at which time stipulations were finally agreed upon and entered into by the respective parties, which provided for a reduction of the several allowances made in the western jurisdictions, respectively, as hereinbefore stated, including the stipulation in this jurisdiction mentioned and referred to in the final Receivers' report and petition for the allowance of further fees and compensation in favor of Receiver Lieurance and Attorney Eliassen.

(i) The objectors and exceptors state that the

reduction of such allowances in this jurisdiction as well as in the other western jurisdictions was agreed to by Receiver Lieurance and Attorney Eliassen under the compulsion of the matters and facts set forth in the petition of Walton N. Moore hereinbefore mentioned, and was not agreed to by them voluntarily, "in the interests of harmony," excepting in the sense that Receiver Lieurance and Attorney Eliassen desired to placate the objecting and protesting creditors, and avoid giving them and further offense through a litigation of the issues tendered by the above-mentioned petition of Walton N. Moore. At the [76] time that such stipulations were signed, it was mutually understood by all of the parties thereto, as expressly provided in such stipulations, that while Receiver Lieurance and Attorney Eliassen should have the right to make application for further allowance of fees and compensation, if they should be so advised, nevertheless, that the creditors should have the right to object to any further allowances of fees or compensation in favor of either Receiver Lieurance or Attorney Eliassen; and both Receiver Lieurance and Attorney Eliassen knew that it was the intention of the eastern creditors to interpose objections and exceptions to the making of any further allowances in favor of either Receiver Lieurance or Attorney Eliassen.

(j) Virtually all of the time involved in the negotiations which resulted in the stipulations hereinbefore mentioned was consumed by discussions of the historical matters to be inserted in such

stipulations by way of preamble. Receiver Lieurance and Attorney Eliassen proposed forms of stipulation which, by implication, recited, in substance, the matters which they have included in the final report, and which are covered by this objection and exception. The petitioning creditor Walton N. Moore above mentioned, who signed such stipulations on behalf of certain of the creditors, objected to such proposed recitals of fact for the reason that they did not truthfully state the facts, and positively refused to sign any stipulations with such recitals included therein. After several months of negotiations and discussions upon the subject, the objectionable recitals were eliminated and the stipulations were signed and filed. Now, by their final report, Receiver Lieurance and Attorney Eliassen present, in substance, the same matters to the Court, and which do not accurately state or represent the true facts in the premises for the reasons hereinbefore stated.

(k) A copy of the petition of Walton N. Moore [77] hereinbefore mentioned is hereto attached, marked Exhibit "A," and is hereby made a part hereof. The objectors and exceptors hereby reallege each and all of the matters set forth in such petition, with the same force and effect as if set forth in *extenso*.

2. As to Receiver Lieurance.

(a) The original or parent receivership proceedings in the United States District Court for the Southern District of New York and the ancillary receivership proceedings in the four western juris-

dictions including the Northern District of California, were instituted, and Receivers Gotthold and Lieurance appointed therein, pursuant to an amicable arrangement and agreement between the creditors and the defendant; all of which is more particularly set forth in Exhibit "A" hereto attached and made a part hereof, to which reference is hereby made.

(b) The primary objects of instituting such receivership proceedings instead of liquidating the affairs of the defendant company in the bankruptcy proceedings instituted in the United States District Court for the Southern District of New York, as more particularly set forth in Exhibit "A," hereto attached, were (1) to afford the defendant company an opportunity to refinance and reorganize itself during the sixty-day period of the temporary receivership, which the defendant company hoped and expected to be able to do; or (2) in the event of the inability and failure of the defendant company to refinance and reorganize its affairs to liquidate the defendant company by means and methods which would reduce the expenses of liquidation which would normally be incurred if effected in the bankruptcy proceedings; all of which was well known and agreed to by all the parties including the Receivers Gotthold and Lieurance. Receiver Lieurance was selected and recommended by R. A. Pilcher, the president and active manager of the defendant [78] company, and accepted by the creditors' committee upon such recommendation.

(c) The maximum normal fees and compensa-

tion which would be allowed a trustee or receiver in bankruptcy, if the affairs of the defendant company had been liquidated in the bankruptcy proceedings, would be less than the sum of $10,000, covering all jurisdictions, including the eastern jurisdiction and the four western jurisdictions.

(d) The services rendered and performed by Receiver Lieurance were and are of a reasonable value less than the sum of $10,000, covering all jurisdictions, including the eastern jurisdiction and the four western jurisdictions. Receiver Lieurance has already received $15,000 for such services; and Receiver Gotthold has received the sum of $7,500 for his services as Receiver in the eastern jurisdiction, and makes no claim for any fees or compensation for services in any of the western jurisdictions.

(e) The services rendered and performed by Receiver Lieurance in the above-entitled proceeding in the Northern District of California were and are of a reasonable value less than the sum of $3,500; and the maximum fee and compensation which would be allowed a trustee or a Receiver in bankruptcy for similar services would be considerably less than such sum of $3,500, and Receiver Lieurance has already received the sum of $3,500 on account thereof.

(f) The objectors and exceptors deny that Receiver Lieurance, "ever since his appointment as receiver herein has neglected his own affairs and devoted his time and efforts to the affairs of this estate" as stated in the final report. On the con-

trary, the objectors and exceptors are credibly informed and believe and therefore state the fact to be that during all of such time Receiver Lieurance was virtually retired [79] from active business, and was living virtually a life of leisure, which was not materially interrupted by his duties as Receiver excepting during the months of August, September and October, 1926, and even not wholly interrupted during those months. During the sixty-day period of the temporary receivership, R. A. Pilcher was employed to assist in the supervision of the affairs of the defendant company and for such services he was paid the sum of $750 per month by Receiver Lieurance. During the sixty-day period of the temporary receivership and during the greater part of the month of August, 1926, the efforts of all parties, including Mr. Pilcher and Receiver Lieurance, were directed mainly to the purpose of refinancing and reorganizing the defendant company; and that work was performed primarily for the benefit of Mr. Pilcher and the defendant company, although the creditors would have been incidentally benefited if those efforts had been successful. Several of the creditors and members of the creditors' committee aided in this work without compensation.

(g) The objectors and exceptors are credibly informed and believe and therefore state the fact to be, that a considerable portion of the conferences between Receiver Lieurance and Mr. Pilcher during the sixty-day period of the temporary receivership and also in the month of August, 1926, were devoted to efforts by Mr. Pilcher to induce

Receiver Lieurance personally to aid him in refinancing and reorganizing the defendant company.

(h) After it was ascertained that there was no hope of refinancing and reorganizing the defendant company, it was determined to dispose of all of the assets of the defendant company by bulk sales; and the western stores were operated only for a period of a few weeks until the several western stores could be advertised for sale, the bids received, and the highest bidders respectively determined and the sales concluded. This [80] work was all completed before October 31, 1926, since which latter date virtually no duties have devolved upon Receiver Lieurance in the premises other than the payment of the expenses of administration, and making of reports to the several courts, the distribution of dividends, and the rendering of a final account together with a final report, most of which consisted of clerical and accounting services, which were rendered by others employed by Receiver Lieurance for that purpose at the expense of the estate.

(i) In the performance of his services, Receiver Lieurance provided himself with ample assistance and facilities, which minimized the amount of his personal labors, and the expense of which is charged against the receivership; and, in addition to that, some of the members of the Creditors' Committees rendered important and valuable assistance, and particularly in the matter of formulating the policies and general methods to be pursued, all without any compensation whatever, and without any

expense to the receivership, thus carrying out the primary object of reducing the expenses which would have been incurred by a liquidation of the affairs of the defendant company in the bankruptcy proceedings.

3. As to Attorney Eliassen.

(a) There was no opposition to the appointment of the receivers in the ancillary proceedings instituted in the four western jurisdictions, or to the administration of such receiverships, respectively. Such ancillary receivership proceedings were instituted and thereafter conducted pursuant to the amicable arrangement and agreement between the creditors and the defendant company hereinbefore mentioned.

(b) The institution of such ancillary proceedings did not involve any original labor or research on the part of Attorney Eliassen. The complaints or petitions in such ancillary proceedings [81] were exact copies of the original complaint or petition prepared and filed by the eastern attorneys for the receivers in the original or parent proceedings instituted in the United States District Court for the Southern District of New York, with the addition of appropriate allegations setting forth the facts concerning the appointment of the receivers in the eastern jurisdiction with permission to institute ancillary proceedings in the western jurisdictions.

(c) Virtually all of the legal services required in the ancillary proceedings in the western jurisdictions and which were performed by Attorney

Eliassen were of a formal nature. There were a few collateral contested matters of minor importance but these matters did not involve complicated issues, or require services extending over any considerable length of time; nor did they involve any considerable portion of the estate, relatively speaking. While it is true that the formal matters required a considerable amount of labor, a large part thereof consisted of clerical and accounting services requiring only the supervision of Attorney Eliassen, and which were performed by others employed therefor at the expense of the estate.

(d) The actual reasonable value of the services performed by Attorney Eliassen, in all of the western jurisdictions, including the northern district of California, is less than the sum of $15,000; and Attorney Eliassen has already received the sum of $15,000; on account thereof. The actual reasonable value of all of the services rendered by Attorney Eliassen in the above-entitled proceeding in the Northern District of California is considerably less than the sum of $5,000 and he has already received $5,500 on account thereof.

III.

HEARING UPON THESE OBJECTIONS AND EXCEPTIONS, ETC.

(a) To present the evidence in support of these [82] objections and exceptions, it will be necessary to take oral testimony both in California and in New York City, and possibly in Oregon and Washington.

(b) The objectors and exceptors are credibly informed and believe, and therefore state the fact to be, that the New York Committee of the eastern creditors, and Receiver Gotthold concur in the objections and exceptions hereinbefore presented and the grounds in support thereof hereinbefore set forth, and desire to participate in the hearing of such objections and exceptions.

(c) Receiver Lieurance and Attorney Eliassen have filed final reports and petitions for the allowance of further fees and compensation in the three other western jurisdictions and hearing thereon have been set for divers times in August, 1926. The objectors and exceptors respectfully suggest that in passing upon the petition of Receiver Lieurance and Attorney Eliassen for the allowance of further fees and compensation, the action heretofore taken and hereafter to be taken in the other Western jurisdictions should be considered. The petitions for the allowance of further fees and compensation, filed in the four Western jurisdictions, are necessarily interrelated; a determination of them will require a consideration of virtually the same evidence; and a consideration and a hearing of them separately will necessarily multiply and greatly increase the expenses thereof. Therefore, the objectors and exceptors respectfully recommend that Receiver Lieurance and Attorney Eliassen be required to consent to a consolidation of all of such petitions, to be disposed of upon a single hearing, and thereby facilitate a just disposition thereof, and greatly reduce the expenses thereof;

WHEREFORE, the objectors and exceptors respectfully pray the Court: [83]

(1) That the Receivers' account, as to the item of $5,900.00 paid to Phillip A. Hershey & Co. on December 31, 1926, be disapproved and disallowed and that Receiver Lieurance be recharged therewith;

(2) That no further fees or compensation be allowed to Receiver A. F. Lieurance.

(3) That no further fees or compensation be allowed to Attorney Edward R. Eliassen.

(4) That a time be fixed for the hearing of these objections and exceptions, which will allow ample opportunity for the taking of testimony and the introduction of evidence; or, that the matter be referred to a Special Master if the Court be so advised.

(5) That, in the meantime, Receiver Lieurance and Attorney Eliassen be required forthwith to file with the clerk of this court all original contracts, documents, books of account, vouchers, checks issued by the receiver or receivers and returned as paid, and all other original records pertaining to such receivership, with leave to the objectors and exceptors to inspect the same; and that the objectors and exceptors or any other creditors of the defendant, be hereafter permitted to interpose any further objections and exceptions, if any ground therefor shall hereafter appear, the right to do so being hereby expressly reserved by these objectors and exceptors, not only on behalf of themselves, but on behalf of any and all of the creditors;

(6) That any and all of the other creditors of the defendant company be permitted hereafter to join in the objections and exceptions hereby interposed or hereafter to be interposed by these objectors and exceptors, and to introduce evidence in support thereof, if they be so advised;

(7) That the Court make such other and further [84] order and take such other and further action in the premises, as shall be equitable and just.

Dated: June 23, 1927.

WALTON N. MOORE DRY GOODS COMPANY.

By JOSEPH KIRK,
Its Attorney.

J. H. NEWBAUER & COMPANY,
By J. H. NEWBAUER,
President.

G. W. REYNOLDS, INC.,
By JOSEPH KIRK,
Its Attorney.

L. DINDELSPIEL COMPANY, INC.,
By E. F. FAHRBACH,
Vice-president.

FRANCIS J. HENEY,
JOSEPH KIRK,
Attorneys for Above Petitioners. [85]

State of California,
City and County of San Francisco,—ss.

E. F. Fahrbach, being first duly sworn, deposes and says that he is the vice-president of L. Dinkelspiel Company, Inc., a corporation, and one of the

creditors named in and who signed the foregoing objections and exceptions; that he has read the said objections and exceptions and knows the contents thereof; that the same is true of his own personal knowledge excepting as to the matters therein stated on information and belief and as to those matters he believes it to be true.

By E. F. FAHRBACH,

Subscribed and sworn to before me this 27 day of June, 1927.

[Seal] C. J. DORAN,

Notary Public in and for the City and County of San Francisco, State of California. [86]

EXHIBIT "A."

In the United States District Court, in and for the Northern District of California.

(IN EQUITY—No. 1707.)

SIDNEY GILSON, HERMAN AVRUTINE and SAMUEL AVRUTINE, Copartners Engaged in Business as NATIONAL GARMENT CO.,

Complainants,

vs.

R. A. PILCHER CO., INC.,

Defendant.

PETITION IN ANCILLARY PROCEEDINGS, RECEIVERS, ETC.

The undersigned, Walton N. Moore (hereinafter mentioned and referred to as "Petitioner"), respectfully presents to the Court this petition, on behalf of Walton N. Moore Dry Goods Company, a creditor of the above-named defendant in the sum of $29,316.07, and also on behalf of 55 other California creditors of the defendant whose claims aggregate $65,809.12; also on behalf and for the benefit of the New York Committee of the eastern creditors of the defendant and which committee represents creditors whose claims aggregate more than three-fourths of the total indebtedness of the defendant; and also on behalf and for the benefit of all of the creditors of the defendant, generally; and, in that behalf, the petitioner respectfully represents and states to the Court:

I.

CIRCUMSTANCES LEADING TO ELECTION OF A COMMITTEE OF DEFENDANT'S CREDITORS.

(*2*) On or about May 1, 1926, the above-named defendant, R. A. Pilcher Co., Inc., became and was unable to meet its maturing obligations: which condition (as defendant then and thereafter represented) was caused largely, if not wholly by the fact that the defendant had rapidly expanded its business until [87] it had reached a volume

which was beyond the capacity of its working capital.

(b) By reason of the premises, hereinbefore stated, on or about May 6, 1926, certain of the stockholders of the defendant, for the purpose of increasing the permanent working capital of the defendant, purchased additional capital stock of the defendant, in the aggregate sum of $75,000, which sum was paid to the defendant in cash and became and thereafter remained a part of the cash assets of the defendant, and thereafter was turned over, as a part of the assets of the defendant, to the receivers appointed, as hereinafter set forth.

(c) Notwithstanding the increased capital provided as hereinbefore stated, the defendant became and was subjected to increased pressure by certain of its creditors; the financial affairs of the defendant became more acute; and the defendant became and was threatened with legal proceedings, which, if they resulted in an immediate liquidation of the affairs of the defendant would necessarily subject the defendant and all of its creditors to an irretrievable loss.

(d) Because of the premises, on or about May 28, 1926, the defendant voluntarily communicated to its creditors the facts concerning its financial condition and affairs, hereinbefore set forth, and thereupon, on said May 28, 1926, a general meeting of the creditors of the defendant, whose claims exceeded in amount of the sum of $200.00, respectively, was held at New York City. A substantial majority

(in amount) of the total indebtedness of the defendant was represented at such meeting.

(e) The general meeting of creditors, hereinbefore mentioned, among other things elected a, committee, composed of five members, including this petitioner; and which committee, with some changes as to personnel, at all times thereafter has acted and still is acting, on behalf of the creditors of the [88] defendant. Hereinafter, such committee will be mentioned and referred to as the "Creditors' Committee."

II.

CREDITOR'S AGREEMENT, AND OTHER CIRCUMSTANCES LEADING TO RECEIVERSHIP PROCEEDINGS.

(a) The principal purpose for which the Creditors' Committee was created, was that, by appropriate agreement (1) among the creditors and (2) between the creditors and the defendant such committee should be invested with power to supervise and direct the business and affairs of the defendant, in the interest and for the benefit of all of the creditors of the defendant. Each of the members of the Creditors' Committee agreed to, and thereafter did, act and serve without compensation.

(b) Pursuant to the premises, hereinbefore set forth, on or about June 3, 1926, a certain agreement in writing was entered into by and between (1) the defendant, (2) certain of the stockholders of the defendant, and (3) the Creditors' Committee hereinbefore mentioned, by the terms of

which it was provided, among other things, that all of the voting stock of the defendant (and which constituted a majority of the outstanding "Class C" stock of the corporation) should be transferred and delivered to the Creditors' Committee, to be held by the Creditors' Committee so long as such agreement should remain in force for the purpose of controlling the conduct and operation of the defendant, and with authority to continue the business of the defendant, or to liquidate the same in accordance with certain terms and conditions specified in such agreement; and, among other provisions, contained a provision to the effect that such agreement should be submitted to the several creditors of the defendant for their approval and signature, whereby the creditors should become parties thereto; also a provision which authorized the Creditors' Committee to act for the defendant and creditors [89] in all actions, suits, bankruptcy proceedings, or other legal proceedings, affecting the defendant or any of its creditors.

(c) At the time of the execution of the written contract hereinbefore described, and as a part of the same general transaction, it was orally agreed by and between the Creditors' Committee and the defendant, among other things, (1) that one of the creditors represented by the Creditors' Committee should institute in the District Court of the United States, for the Southern District of New York a suit in equity, against the defendant herein, in which suit the plaintiff therein should file a bill

in equity or complaint setting forth the facts concerning the financial condition and affairs of the defendant, together with the threatened loss to the defendant and its creditors unless the assets of the defendant should be conserved by appropriate action upon the part of the Court and particularly by the appointment of a temporary receiver to take charge of and protect the assets of the defendant: (2) that the Creditors' Committee and the defendant should agree upon and recommend to the Court some suitable person or persons to act as receiver or receivers in the premises; (3) that thereafter, similar action should be taken by ancillary proceedings to be instituted in the District Court of the United States for the Eastern District of Washington, the Western District of Washington, the District of Oregon, and the Northern District of California; (4) that in each of such ancillary proceedings, due and proper application should be addressed to the court, to appoint as receiver or receivers, the same person or persons appointed in the proceedings to be instituted in the Southern District of New York as hereinbefore set forth; and (5) that in the meantime, bankruptcy proceedings should be instituted, if the same should be deemed advisable, to protect the assets of the defendant against intervening legal proceedings designed to gain preferential advantages over [90] the general creditors.

III.

RECEIVERSHIP PROCEEDINGS AND TRANSACTIONS INCIDENTAL THERETO.

(a) Pursuant to the premises hereinbefore set forth on or about June 3, 1926, the above-named plaintiff instituted in the United States District Court for the Southern District of New York, a suit against the above-named defendant, entitled as above, excepting as to the venue and the docket number thereof; and at the time of the institution of such suit, the Creditors' Committee and the defendant agreed upon and recommended to the court, the appointment of A. F. Lieurance of Oakland, Alameda County, California, and Arthur F. Gotthold, of New York City, as temporary receivers.

(b) Thereafter, and on said June 3, 1926, and upon the joint recommendation of the Creditors' Committee and the defendant, and not otherwise, by due proceedings had in the action instituted and then pending as hereinbefore stated, in the United States District Court for the Southern District of New York, the Honorable Augustus N. Hand, United States Judge presiding, an order was made and entered appointing A. F. Lieurance and Arthur F. Gotthold hereinbefore mentioned as temporary receivers in said action, authorizing and directing such receivers to take possession and charge of the affairs and assets of the defendant, and further authorizing such receivers, among other things, to institute ancillary proceedings in other jurisdictions.

(c) Thereafter, pursuant to the premises, and on or about June 9, 1926, the above-entitled proceeding was instituted in the above-entitled court, which proceeding was and is ancillary to the original proceeding instituted in the United States District Court for the Southern District of New [91] York, as hereinbefore stated; and thereafter, upon said June 9, 1926, and upon the verified petition of said A. F. Lieurance filed on behalf of himself and said Arthur F. Gotthold, an order was made and entered in the above-entitled proceeding, appointing said A. F. Lieurance and Arthur F. Gotthold temporary receivers of the above-named defendant and all of its property, assets and effects, upon the giving, by such receivers, of bonds in the sum of $10,000 each, which bonds were thereafter duly given and approved.

(d) Immediately and thereafter, pursuant to the premises, similar ancillary proceedings were instituted in the United States District Court for each of the following named districts, to wit: The Eastern District for the State of Washington, the Western District for the State of Washington, and the District of Oregon; each of which proceedings was entitled as above except as to the venue and docket number thereof; and in each of which ancillary proceedings, upon the verified petition of said A. F. Lieurance filed on behalf of himself and said Arthur F. Gotthold, said A. F. Lieurance and Arthur F. Gotthold were appointed temporary receivers of the above-named defendant and all of its property, assets and effects, in the same general manner, with

the same general authority, and upon the same general terms and conditions, as in the above-entitled action, as hereinbefore set forth.

(e) Each of the orders appointing said A. F. Lieurance and Arthur F. Gotthold temporary receivers as hereinbefore stated, contained a provision, among others, whereby, in substance, such receivers were directed, within thirty days from the date of said orders, respectively, to mail to each and every creditor of the defendant a copy of such order and a notice of motion to make such receivership permanent.

(f) In the meantime, and on or about June ——, 1926, pursuant to an agreement between the Creditors' Committee [92] and the defendant and with the prior knowledge, approval and acquiescence of the temporary receivers A. F. Lieurance and Arthur F. Gotthold appointed as hereinbefore stated, proceeding in bankruptcy pertaining to the affairs and assets of the defendant were instituted; but no steps were ever taken in said bankruptcy proceedings to secure the appointment of a receiver or trustee for the affairs or assets of the defendant, and no further steps of any kind were had or taken in said bankruptcy proceedings for the purpose of administering or liquidating the estate of the defendant. The primary purpose of such bankruptcy proceedings was to stop the efforts of some of the smaller creditors who were attempting to secure preference by the institution of attachment or other legal proceedings.

(g) In the meantime, and at about the time of the institution of the proceedings in the United States District for the Southern District of New York, as hereinbefore stated, the Creditors' Committee communicated to each and all of the known creditors of the defendant the true facts in the premises for the purpose of inducing such creditors to approve, execute and become parties to, the agreement of June 3, 1926, hereinbefore mentioned and described.

(h) The primary purpose of the receivership proceedings herein mentioned, including the permanent receivership hereinafter mentioned, together with the bankruptcy proceedings hereinbefore mentioned was to obviate a waste of the assets of the defendant available to satisfy the indebtedness of the defendant to its creditors, through the payment of fees and expenses to referees, receivers and trustees in bankruptcy, and counsel fees incident thereto, which would be likely to be incurred if the affairs of the defendant were administered and liquidated otherwise than through receivership proceedings instituted in equity as hereinbefore stated; all of which was known and [93] agreed to by the Creditors' Committee and the defendant, and was known to and approved by, the receivers A. F. Lieurance and Arthur F. Gotthold, appointed as hereinbefore stated.

(i) In the meantime, the desired number of the creditors of the defendant having failed to execute and become parties to the agreement of June 3, 1926, hereinbefore mentioned, said receivers A. F.

Lieurance and Arthur F. Gotthold, prior to the expiration of the thirty days period after the date of the orders appointing them receivers as hereinbefore stated, gave written notice to the creditors of the defendant required by the orders appointing them receivers as hereinbefore stated and took such further proceedings, that on or about August 9, 1926, their appointment as such receivers was made permanent.

(j) Thereafter, and pursuant to the premises, said receivers, with the advice and aid of said Creditors' Committee, proceeded to and did liquidate the affairs and assets of the defendant, and on December 9, 1926, stated and reported to the court in said original and ancillary proceedings, respectively, that they had on hand as such receivers approximately $475,000. This petitioner is informed and believes and therefore alleges that a portion of such amount is in the personal custody or possession of receiver Gotthold in New York City and the balance thereof is in the personal custody or possession of receiver Lieurance at Oakland, California.

IV.

PROCEEDINGS BY THE RECEIVERS AND THEIR ATTORNEYS TO SECURE PAYMENTS ON ACCOUNT OF SERVICES AND FEES.

(a) On December 7, 1926, upon the application and motion of receiver Gotthold and his attorneys at New York City, an order was entered in the pro-

ceedings pending in the United States District Court for the Southern District of New York as hereinbefore stated, directing among other things, the payment of a 40% dividend to the creditors of the defendant. Upon the [94] same day, receiver Gotthold and his attorneys applied to the last named court for an allowance and payment of $10,000 to receiver Gotthold on account of his fees and compensation and the sum of $10,000 to his attorneys on account of services rendered.

(b) On December 9, 1926, this petitioner received a telegram from William Fraser, the New York member (and chairman) of the Creditor's Committee informing this petitioner of the order directing payment of dividend to the creditors as hereinbefore stated, and further informing this petitioner that Receiver Gotthold and his attorneys had applied for allowances and payments on account as hereinbefore stated; and said telegram contained the following:

> "Judge Hand invited suggestions from Committee. After consultation we told him that without knowing what allowance Lieurance and his counsel would seek in western jurisdiction committee was not in position to make recommendation. . . . Please get in touch with Love. See Lieurance and Eliassen. Find out if possible what charges will be. Advise results by wire because we want to include your views in recommendation to Judge Hand."

(c) Immediately upon receiving such telegram, this petitioner communicated the contents thereof to Receiver Lieurance and his attorney Edward R. Eliassen, and an appointment was then made, pursuant to which, during the afternoon of December 9, 1926, a conference was held in the office of Joseph Kirk, Esq., attorney for the Board of Trade of San Francisco (such Board of Trade being the representative of many of the western creditors of the defendant), which conference was attended and participated in by Receiver Lieurance, his attorney, Edward R. Eliassen, Joseph Kirk and this petitioner. At such conference after a thorough discussion of the subject, it was mutually agreed by all of the parties to such conference, that the allowance asked for by Receiver Gotthold and his attorneys were excessive; that the view of the members of the western Creditors' Committee should be ascertained and presented to the courts respectively before [95] any action should be taken concerning allowances to the Receivers or their attorneys respectively; that this petitioner should immediately enter into communication with the members of such Committee, for the purpose of ascertaining and communicating their views in the premises; and that in the meantime the New York Receiver and his attorney, together with the New York members of the Creditors' Committee, should be asked to request Judge Hand to postpone action upon the question of making allowances to the Receivers and their attorneys, respectively, until the

Receivers, their attorneys and the members of the Creditors' Committee could exchange views and agree upon the gross amount to be asked for in all jurisdictions. Thereupon, Receiver Lieurance, his attorney Edward R. Eliassen, Joseph Kirk, and this petitioner agreed upon and drafted a telegram to be, and which thereafter and upon said December 9, 1926, was, transmitted to William Fraser in response to the latter's telegram of December 8, 1926, hereinbefore mentioned. The telegram addressed to William Fraser, the wording of which was agreed upon by Receiver Lieurance and his attorney Edward R. Eliassen, as hereinbefore stated, contained the following:

> "To avoid possible conflict between Eastern and Western courts as to amounts of allowances to Receivers and their attorneys, as chairman of Creditors' Committee here and member of New York Committee, I earnestly request that question of such allowance be deferred for time being until Receivers and attorneys and committee can exchange views and come to some agreement concerning gross amount to be asked for."

(d) Immediately after the conference of December 9, 1926, hereinbefore described, this petitioner entered into communication with the other members of the Western Creditors' Committee and other interested parties for the purpose of ascertaining their views upon the question of allowances to the Receivers and their attorneys, respectively;

all pursuant to the arrangement agreed upon at the conference of December 9, [96] 1926, hereinbefore mentioned.

(e) Notwithstanding the premises, immediately after the conference of December 9, 1926, hereinbefore mentioned, and on December 10, 1926, and at divers times thereafter until and on December 16, 1926, Receiver Lieurance and his attorney Edward R. Eliassen, presented to the several courts in the western jurisdictions hereinbefore named, respectively, applications for allowances of payments to Lieurance and his attorney Eliassen, respectively and obtained from each of such courts, respectively, orders making such allowances, as follows:

ALLOWANCES TO RECEIVER LIEURANCE:

Northern District of California,	$10,000
District of Oregon	14,500
Western District of Washington	13,000
Eastern District of Washington..	5,000
TOTAL	$42,500

ALLOWANCES TO RECEIVER'S ATTORNEY EDWARD R. ELIASSEN:

Northern District of California ..	$10,000
District of Oregon	10,000
Western District of Washington.	5,000
Eastern District of Washington .	2,500
TOTAL	$27,500

(f) Each of said allowances was applied for and obtained in violation of said arrangement and agree-

ment entered into at the conference of December 9, 1926, hereinbefore mentioned, and without notice to, knowledge by, or consent of this petitioner or (as this petitioner is informed and believes) any of said Western Creditors' Committee, or any of the other Creditors' Committees, or, so far as this petitioner is informed and believes, any of the creditors of the defendant.

(g) This petitioner has no knowledge or information concerning the representations or statements made by Receiver Lieurance and his attorney Edward R. Eliassen to the courts [97] in the Eastern District of Washington or the Western District of Washington or the District of Oregon; but the statements and representations made by Receiver Lieurance and his attorney Edward R. Eliassen to the above-named court and upon the order of the above-named courts making such allowances were misleading and deceptive in the particulars, among others, hereinafter set forth.

(h) On December 10, 1926, Receiver Lieurance and his attorney Edward R. Eliassen presented to the Honorable A. F. St. Sure, as presiding judge of the above-named court, a petition praying for an order (among other things) authorizing the Receivers to pay to Edward R. Eliassen "such allowance on account of attorney's fees as to this court may seem reasonable and proper; also fixing and allowing the sum to be paid at this time on account of Receiver's fees." Such petition contained certain statements of facts and representations intended and designed to influence the decision and

action of the court in the premises, which representations and statements included the following:

> "That Edward R. Eliassen, Esq., has represented and does now represent both the Receivers and has acted as their attorney during the entire administration in all of the Western jurisdictions. He had been paid nothing on account of such services and the Receivers desire that they be authorized by the above-entitled Court to make payment of a reasonable sum on account, to him at this time. All of the stores of the defendant corporation were here in the Western jurisdiction; all of the business in connection with the said stores and the legal work connected therewith, and the administration of the estate in this Western Jurisdiction has been attended to by him. The amount of work involved has been considerable. And we therefore, recommend that such payment be made at this time to him on account, as the Court may deem fair and reasonable.
>
> That the Receivers have not paid themselves anything on account of their services so far; that the condition of the estate and the value of the services performed warrant, we submit, a payment now on account of such services rendered." [98]

(i) Influenced by and relying upon the statements and representations contained in said petition, including the statements and representations above quoted, on December 10, 1926, the Honor-

able A. F. St. Sure, as Judge of said United States District Court made an order in the premises containing, among other things, the following provisions:

> "That Edward R. Eliassen, Esq., attorney for the Receivers be paid immediately the sum of $10,000 to apply on account of services rendered.
>
> That the sum of $10,000 be paid to apply on account of Receiver's services; to be divided 75% thereof to Receivers A. F. Lieurance and 25% thereof to Arthur F. Gotthold, his co-receiver."

(j) By the statements and representations above quoted, Receiver Lieurance and his attorney Edward R. Eliassen represented and apparently intended to induce the above-named court to understand and believe, that the allowances to be made by the above-named court to Receiver Lieurance and his attorney Edward R. Eliassen, respectively, would be based upon, and in consideration of, the services rendered by Receiver Lieurance and his attorney Edward R. Eliassen in all of the western jurisdictions; whereas in truth and in fact it was then their intention also to apply to each of the other western jurisdictions for similar allowances for fees and services, and immediately thereafter they did so apply.

(k) The petition presented to the above-named court on December 10, 1926, as hereinbefore stated, contained a further statement, in substance, to the effect that the attorneys who represented the Re-

ceivers in the proceedings pending in the United States District Court for the Southern District of New York, hereinbefore described, had made application for an allowance on account of services rendered, and concluded with the following statement, with reference thereto:

> "and we are informed that the allowance requested is the sum of $10,000;"

but said petition failed to disclose the fact that the chairman of the New York Creditors' Committee had sent a telegram to [99] this petitioner stating that Judge Hand requested the views of the members of the Creditors' Committee before taking action upon said application for allowance of attorney's fees; and failed to disclose the fact that Receiver Lieurance, his attorney Edward R. Eliassen, Joseph Kirk, as attorney for the Board of Trade and many of the western creditors, and this petitioner as chairman of the western Creditors' Committee and a member of the New York Creditors' Committee had agreed that the allowance asked for by Receiver Gotthold and his attorneys were excessive and that no action would be taken with reference to the allowance of payments to the Receivers or their attorneys, respectively, until the Creditors' Committees should exchange views among themselves and with the Receivers and their attorneys, and agree upon the gross amount of fees to be asked for in all jurisdictions; and failed to disclose the fact that this petitioner, with the approval and acquiescence of Receiver Lieurance and his attorney Edward R. Eliassen, had sent to the chair-

man of the New York committee a telegram asking that the Judge of the New York court be requested to postpone action in the premises until the views of the Creditors' Committee could be ascertained and communicated to the court; all of which took place on the preceding day, December 9, 1926, at the office of Joseph Kirk as hereinbefore stated; and by the statements and representations contained in said petition, and otherwise, Receiver Lieurance and his attorney Edward R. Eliassen concealed from this court the fact which was well known to them and had been approved by them as hereinbefore stated, that the members of the Creditors' Committee desired to present their views in the premises to the several courts, respectively, before any action should be taken by any of the several courts, concerning the matter of making allowances for fees or services to either of the Receivers or their attorneys respectively. [100]

(I) By said petition, and the statements and representations made therein, Receiver Lieurance and his attorney Edward R. Eliassen represented to this court that the Eastern Receiver, Arthur P. Gotthold should receive one fourth of the amount ordered by this court to be paid to the receivers as above stated; whereas as both Receiver Lieurance and his attorney Edward R. Eliassen well knew, Receiver Gotthold had never rendered any services whatever in any of the western jurisdictions, and this petitioner is informed by Receiver Gotthold and believes and therefore alleges that it then was and for a long time prior thereto had been understood

and agreed by and between Receiver Gotthold and Receiver Lieurance that Receiver Gotthold should retain all of the moneys allowed by the United States District Court for the Southern District of New York for Receivers' fees, with no participation therein by Receiver Lieurance, and that Receiver Lieurance should retain all of the moneys allowed by the several United States District Courts in the western jurisdictions hereinbefore named, for Receivers' fees, with no participation therein, or any thereof by Receiver Gotthold. This petitioner is informed by Receiver Lieurance and his attorney Edward R. Eliassen, and believes that the orders obtained in the other western jurisdictions contained provisions for the participation by Receiver Gotthold in the allowances made as hereinbefore stated; the order so made by the United States District Court for the Western District of Washington being to the effect that the division of the fees should be definitely fixed at the time of the final allowance of fees, while the orders so made in the other two jurisdictions provided for definite and specific amounts in favor of Receiver Gotthold. This petitioner is further informed by the New York attorneys for Receiver Gotthold and believes, and therefore alleges, that immediately after procuring the several allowances hereinbefore mentioned, [101] Receiver Lieurance sent to Receiver Gotthold at New York City a telegram requesting Receiver Gotthold immediately to assign to Receiver Lieurance all of the interest of Receiver Gotthold in all of the allowances so made in the Western jurisdic-

tions to Receiver Lieurance. This petitioner therefore alleges that Receiver Lieurance secured said several allowances *o*bstensibly for the benefit of Receiver Gotthold, but in fact for the concealed but sole and exclusive benefit of himself, Receiver Lieurance.

V.

DISCOVERY BY PETITIONER OF THE ALLOWANCES OBTAINED BY RECEIVER LIEURANCE AND HIS ATTORNEY AND SUBSEQUENT TRANSACTIONS IN RELATION THERETO.

(a) On December 16, 1926, this petitioner was engaged in securing the views of the members of the Creditors' Committee for the purposes hereinbefore stated; Judge Hand had postponed action concerning the matter of making allowances in favor of Receiver Gotthold and his attorney until the views of the several Creditors' Committees were ascertained and communicated to him, in compliance with a request and recommendation made by the New York Creditors' Committee pursuant to the telegram of December 9, 1926, hereinbefore mentioned; all pursuant to the understanding and agreement entered into by and between Receiver Lieurance, his attorney Edward R. Eliassen, Joseph Kirk and this petitioner as hereinbefore set forth.

(b) On said December 16, 1926, after Receiver Lieurance and his attorney Edward R. Eliassen had obtained all of the allowances in favor of themselves as hereinbefore stated, and not before, Re-

ceiver Lieurance sent from Portland, Oregon, to this petitioner at San Francisco, California, the following telegram:

> "Work completed here this morning stop orders obtained all jurisdictions pay forty percent dividends stop allowance to attorney California ten thousand Spokane twenty five hundred [102] Seattle five thousand Portland ten thousand total twenty seven thousand five hundred stop allowance to Receivers California ten thousand dividend seventy five and twenty five percent Spokane five thousand division to be made at final hearing Seattle thirteen thousand dividend twelve and one Portland fourteen thousand five hundred dividend thirteen five and one total forty two thousand five hundred stop phoned above information to Mr. Love this morning stop will be home Saturday."

(c) Prior to the receipt of the telegram last above mentioned, neither this petitioner nor, as this petitioner is informed and believes, any other member of the several Creditors' Committees nor any of the individual creditors of the defendant had any knowledge or information that Receiver Lieurance and his attorney Edward R. Eliassen or either of them had been applying for or obtaining any allowances, or taking any other action whatever concerning the question of allowances in favor of the receivers and their respective attorneys or either of them. On the contrary, this petitioner understood and believed, and this petitioner is informed and

believes that all of the other members of the several Creditors' Committees and all other of the interested parties understood and believed, that Receiver Lieurance and his attorney Edward R. Eliassen were in good faith carrying out the understanding and agreement entered into at the conference of December 9, 1926, hereinbefore mentioned.

(d) Immediately after receiving the telegram from Receiver Lieurance last hereinabove mentioned this petitioner transmitted to William Fraser, chairman of the New York Creditors' Committee:

> "Telegram received. stop. To my utter astonishment I received following telegram today from Receiver Lieurance at Portland quote work completed here this morning stop orders obtained all jurisdictions pay forty percent dividends stop allowance to attorney California ten thousand Spokane twenty five hundred Seattle five thousand [103] Portland ten thousand total twenty seven thousand five hundred stop allowance to Receivers California ten thousand dividend seventy five and twenty five percent Spokane five thousand division to be made at final hearing Seattle thirteen thousand dividend twelve and one Portland fourteen thousand five hundred divided thirteen five and one total forty two thousand five hundred stop phoned above information to Mr. Love this morning stop will be home Saturday end quote Receiver Lieurance and his attorney were present when telegram of December ninth to you

was prepared and consented thereto stop in view of this fact we consider applications for allowances in western jurisdiction which were made without any notice to Creditors' Committee here as being unwarranted and in violation of understanding stated in telegram of December ninth. Stop. We contemplate making immediate application to western courts to set aside the allowances as excessive and exorbitant and to give creditors full opportunity of being heard with respect to the allowances stop. Will your committee join in making this application or request to western courts and bear their share of expenses and fees indicent thereto."

(e) Thereafter and on December 17, 1926, the members of the New York Committee presented to Judge Hand their recommendations concerning the question of allowance in favor of receiver Gotthold and his attorneys; and thereafter, and upon the same day Judge Hand made an order allowing the sum of $5,000 in favor of receiver Gotthold and $7500.00 in favor of his attorneys.

(f) In response to this petitioner's telegram to William Fraser dated December 16, 1926, hereinbefore mentioned, this petitioner has received telegrams from William Fraser, Chairman of the New York Creditors' Committee, and from Receiver Gotthold and his attorneys, condemning and repudiating the action of Receiver Lieurance and his attorney Edward R. Eliassen hereinbefore set forth, and stating that the New York Creditors' Committee is desirous of joining with the western Creditors'

Committee in submitting to the respective courts in the western jurisdictions applications for a reconsideration of the allowances made in favor of Receiver Lieurance and his attorney Edward R. Eliassen as hereinbefore set forth, with notice to the creditors and opportunity for them to present their views. [104]

(g) Shortly after the return of Receiver Lieurance and his attorney Edward R. Eliassen from Portland, Oregon, to Oakland, California, and on December 20, 1926, this petitioner and Joseph Kirk (Attorney for the Board of Trade of San Francisco and for a large number of the Western Creditors) had a conference with Receiver Lieurance and his attorney Edward R. Eliassen at the office of Joseph Kirk in the City of San Francisco, and in such conference this petitioner and Joseph Kirk charged Receiver Lieurance and his attorney Edward R. Eliassen with having applied for and obtained allowances (as hereinbefore stated) which were not only grossly excessive, and unfair to the creditors of the defendant and all of the other parties interested in the affairs and assets of the defendant, but also with having made such applications and having secured such allowances, in violation and disregard of the understanding and agreement entered into by and between Receiver Lieurance, his attorney Edward R. Eliassen, Joseph Kirk and this petitioner, at the conference of December 9, 1926, and the telegram with reference thereto sent to William Fraser, with the approval of Receiver Lieurance and his attorney Edward R.

Eliassen, as hereinbefore set forth; and demanded of Receiver Lieurance and his attorney Edward R. Eliassen that they consent that all of said orders for allowances to them, respectfully made by the courts in the several western jurisdictions respectively, as hereinbefore set forth, should be vacated and set aside, and that hearings upon the question of such allowances should be appointed by the several courts in said western jurisdictions, respectively, of which the creditors and other parties interested in the premises should have due and amply notice with opportunity to be heard. In response thereto, Receiver Lieurance and his attorney Edward R. Eliassen promised this affiant and Joseph Kirk to consider the matter and return a definite answer to this petitioner and Joseph Kirk on the morning of the following day, [105] December 21, 1926. Receiver Lieurance and his attorney Edward R. Eliassen failed to make any response, in fulfillment of their promise as hereinbefore set forth, or otherwise. Thereupon, and on December 22, 1926, this petitioner communicated with Edward R. Eliassen, but he failed and omitted to give any definite answer or response to the demand made upon him and Receiver Lieurance as hereinbefore stated. Excepting as hereinbefore stated, this petitioner has never had any communication with or from either Receiver Lieurance or his attorney or Edward R. Eliassen, since December 16, 1926; and this petitioner is informed by Mr. Kirk and believes and therefore alleges, that except as hereinbefore stated, Mr. Kirk has had no communication with

or from either Receiver Lieurance or his attorney Edward R. Eliassen excepting as hereinbefore set forth.

VI.

EXCESSIVE ALLOWANCE MADE TO RECEIVER LIEURANCE AND HIS ATTORNEY EDWARD R. ELIASSEN.

(a) This petitioner is informed and believes and therefore alleges, that the allowances made in favor of Receiver Lieurance and his attorney Edward R. Eliassen respectively, in the above-entitled proceeding, as hereinbefore set forth, were and are grossly excessive. The information upon which this allegation is made is in part, next hereinafter set forth.

(b) If the insolvent estate of the defendant had been administered in the Bankruptcy Court, the commissions allowed to the trustee would not have exceeded the sum of $5,000 and in that behalf, this petitioner further states that by virtue of the rules on General Orders in Bankruptcy promulgated by the United States Supreme Court, and particularly by reason of Rule XLII, no allowance for compensation to either a trustee or his attorney could be made without a petition in that behalf being filed, which petition would be heard and acted upon at a [106] meeting of the creditors duly called for that purpose and not otherwise.

(c) This petitioner is informed by Messrs. McManus, Ernst & Ernst, New York Attorneys for Receiver Gotthold that they consider such allowances to be exorbitant and excessive.

(d) This petitioner is informed by Receiver Gotthold that in his opinion such allowances are excessive, and that it is his desire that such allowances be reconsidered, and, as finally fixed shall be such as will meet with the approval of the creditors.

(e) This petitioner is further informed by Messrs. McManus, Ernst & Ernst, New York attorneys for Receiver Gotthold that Receiver Gotthold will not accept but will renounce all of the fees allowed to him in the Western jurisdiction as hereinbefore set forth.

(f) This petitioner is informed by the attorneys for many of the western creditors that such allowances are exorbitant and excessive and should be very substantially reduced.

VI.

STATEMENTS MADE ON INFORMATION AND BELIEF.

(a) The statements hereinbefore made concerning the financial affairs of the defendant, and the agreements entered into between the Creditors' Committee, the defendant, Receiver Lieurance and his attorney Edward R. Eliassen, are based upon information received by this petitioner as a member of the Creditors' Committee, and upon information received by this petitioner from other members of the Creditors' Committee, and from others who were in a position to have personal knowledge concerning the same and this petitioner believes such statements to be true. [107]

(b) The statements hereinbefore made concerning proceedings in court are based upon the records and files of such courts, together with advice of counsel concerning the true meaning and effect thereof, and this petitioner believes them to be true.

WHEREFORE, this petitioner, on behalf of Walton N. Moore Dry Goods Co., and on behalf of the California Committee of the Creditors of the defendant and of said New York Creditors' Committee, and on behalf of Receiver Gotthold and the New York attorneys for said Receivers, and for the benefit of all of the creditors of the defendant, generally, if they be so advised, prays that the orders of allowance to said Receivers and to said attorneys Edward R. Eliassen made herein on or about December 10, 1926 as hereinbefore set forth, be vacated, discharged and set aside; that a time and place be now set and fixed for the hearing of the application of said Receivers and of said Edward R. Eliassen for allowance on account of compensation or fees, and that due notice of said application and of said time and place for the hearing thereof be sent by said Receivers by mail to all of the known creditors of the defendant.

WALTON N. MOORE,
Petitioner.

JOSEPH KIRK,
FRANCIS J. HENEY,
Attorneys for Petitioner.

(Duly verified by Walton N. Moore.)

[Endorsed]: Filed June 27, 1927. [108]

[Title of Court and Cause.]

ANSWER OF RECEIVERS TO OBJECTIONS AND EXCEPTIONS TO FINAL ACCOUNT AND REPORT OF RECEIVERS FILED IN THE ABOVE-ENTITLED PROCEEDING ON BEHALF OF CERTAIN CREDITORS MENTIONED IN THE WRITTEN OBJECTIONS FILED.

Comes now, Receiver A. F. Lieurance and answers the objections and exceptions to final account and report of the Receivers heretofore filed and for answer thereto, denies, alleges and avers as follows, to wit:

ANSWER TO GENERAL OBJECTIONS AND EXCEPTIONS TO BOTH FINAL ACCOUNT AND FINAL REPORT.

(a) The said Receiver A. F. Lieurance having no information or belief upon the subject sufficient to enable him to answer that portion of Paragraph A on page 2 concerning information received by objectors and basing his denial upon that ground denies that the objectors and exceptors are credibly informed and—or believe, that Arthur F. Gotthold, one of the Receivers herein, has never authorized the making or filing of said Receiver's final account and/or final report, or either thereof, in the form in which they were filed, and/ [109] or that he has never concurred therein, and/or does not now concur therein, and/or on the contrary he objects

and/or excepts to such final account, final report, and petitions for the allowances of further fees and compensation in favor of Receiver Lieurance and Attorney Eliassen. But in this connection, said Receiver A. F. Lieurance alleges that in a letter addressed by him to his Co-receiver, Mr. Gotthold under date March 24, 1927, he stated, among other things, "As we anticipate filing our accounts with the courts very shortly"; that on March 28, 1927, Mr. Gotthold acknowledged receipt of Mr. Lieurance's letter but made no objection to the preparation and filing of the account; that on April 6, 1927, Mr. Gotthold wired to Mr. Lieurance as follows:

> "Please wire have you filed accounting in Ancillary jurisdictions, and if so, send copy air mail";

that in reply to said telegram and on April 6th, Mr. Lieurance sent a wire to Mr. Gotthold, among other things, stating as follows:

> "Accounts are being made up as soon as completed copy will be forwarded you air mail";

that on April 7, 1927, Mr. Gotthold wrote Mr. Lieurance as follows:

> "I trust the accounts can be completed and filed promptly,"

that on April 16, 1927, Mr. Gotthold wrote to Mr. Lieurance saying, among other things, as follows:

> "I hope that before this letter reaches you, I shall have received the accounts referred to in our recent correspondence."

that on April 22, 1927, Mr. Lieurance by letter informed Mr. Gotthold, as follows, to wit:

> "I have found it quite a task to make a detailed and itemized statement of all of the transactions in connection with the operation of the stores and the receivership in general and the making of this itemized report has taken more time than we anticipated, however, [110] this work is now nearing completion and we hope to file our accounts in the courts in the Ancillary jurisdictions within the next ten days. Just as soon as the account is ready for filing, I shall send to you a complete copy."

That on June 1st, 1927, telegram was received by Mr. Lieurance from Mr. Gotthold, reading, among other things, as follows:

> "Received today copy final account and notice of hearing."

That at no time either before the filing of the account or since its filing, has Mr. Gotthold made any objections either to the filing of the account and report by Mr. Lieurance, nor to the payment already made to Phillip A. Hershey & Company of the sum of $5,900, objected to under Item I in Paragraph B on pages 3 and 4, and that in this connection, Mr. Gotthold has not communicated to Mr. Lieurance any objection to the said account or report or petition for fixation of further fees and compensation of Receiver Lieurance and attorney, Edward R. Eliassen.

Receiver Lieurance further avers in this connec-

tion that Mr. Gotthold in reply to a telegram sent him, asking if objections and exceptions filed on his alleged behalf were previously authorized by him or whether they were made with his approval replied by wire as follows:

> " * * * Exceptions and objections were filed without submission to me."

In a telegram sent by Mr. Gotthold to Mr. Lieurance, under date of July 6, 1927, he stated, among other things:

> "Regret the delay very much. Can you not make effort to reach adjustment with attorney for creditors committee without necessity protracted and expensive court proceedings."

In this connection Mr. Lieurance avers that said wire indicates clearly that Mr. Gotthold is not now nor has he objected to the [111] application for further fees and allowances but that he hopes such fees and allowances can be agreed upon between the objectors and the Receiver A. F. Lieurance and his attorney.

ANSWERING PARAGRAPH B ON PAGE 3 OF THE WRITTEN OBJECTIONS AND EXCEPTIONS:

Said Receiver A. F. Lieurance having no information or belief upon the subject sufficient to enable him to answer that portion of the said objections as to the information received by objectors concerning the fee of the accountants and basing his denial upon that ground denies that the objec-

tors and exceptors are further credibly informed and/or believe, that Receiver Gotthold has never authorized or approved the expenditure or the payment of the item "Dec. 31, (1926) Phillip A. Hershey & Co., Accountant fees, $5,900.", which appears at Line 14 at Page 599 of the final account, and in this connection the said Receiver avers that Mr. Gothold has never in any of his telegraphic or letter correspondence with Mr. Lieurance objected to said item or stated anything even tending to imply a repudiation of the responsibility therefor. The correspondence passing between Mr. Gotthold and Mr. Lieurance bearing upon this subject is as follows:

Letter of February 21, 1927, from Mr. Gotthold to Mr. Lieurance:

> "Please let me know the amount paid or agreed to be paid to accountants."

Mr. Lieurance on March 1st, 1927, replied:

> "For the services of the accountants here throughout the term of the Receivership from the time of its inception to date we have paid approximately $8,000."

In letter from Mr. Gotthold, dated March 4, 1927, addressed to Mr. Lieurance, he acknowledges receipt of the letter of Mr. Lieurance dated March 1st, but makes no reference to the [112] amount already paid to accountants.

Since the letter of March 4th, 1927, there has been no further word from Mr. Gotthold concerning this item. And in this connection Receiver Lieurance avers that at no time has Mr. Gotthold made any

comment upon or exception to the said item of $5,900.

ANSWERING PARAGRAPH C ON PAGE 3 OF THE WRITTEN OBJECTIONS AND EXCEPTIONS.

The said Receiver A. F. Lieurance has no knowledge upon the subject of the information or belief of the objectors that Receiver Gotthold never has concurred and does not now concur in the statements set forth in said purported joint report explaining the manner in which Receiver Lieurance and Attorney Eliassen procured interim allowances, the nature of the objections thereto interposed by the creditors, and the circumstances concerning the reduction of such allowances, but in this connection Receiver Lieurance avers that although Receiver Gotthold duly received the final account and report and petition and notice of hearing on June 1, 1927, he has not since said time, nor at any time, nor at all, even intimated to Receiver Lieurance that he does not concur in the said report or that he does not now concur in the purported joint recommendation of the allowance of further fees and compensation in favor of Receiver Lieurance and Attorney Eliassen. And the said Receiver A. F. Lieurance further avers that Mr. Gotthold has never implied to Mr. Lieurance at any time, his repudiation of the statements mentioned or the explanations and recommendations, or that he has objected or excepted thereto. But in this connection Receiver Lieurance reiterates the allegation that the so-called

"objections and exceptions" were filed in the above-entitled proceeding without submission to Receiver Gotthold. [113]

ANSWERING "2. SPECIFIC OBJECTIONS AND EXCEPTIONS TO FINAL ACCOUNT" FOUND ON PAGE 3.

The said Receiver A. F. Lieurance denies that all of the services performed by Phillip A. Hershey & Company in the premises were rendered under a contract between Receiver Lieurance and Phillip A. Hershey & Company by the terms of which the compensation for such services should be the sum of $300 per month and/or no more; or that there was any contract at any time during the administration of this estate between Receiver Lieurance and Phillip A. Hershey & Company concerning the amount to be paid to the accountants. In this connection Receiver A. F. Lieurance avers that Phillip A. Hershey & Company were given a temporary drawing account on account of fees of $300 per month, and that during the month of December, 1926, it was deemed advisable to fix the compensation of the accountants, and that after thoroughly informing himself as to the amount and character of the work done by the said accountants and the amount of time involved in connection therewith, and after inquiry made concerning the reasonable value of such services, an agreement was reached with the said Phillip A. Hershey Company for the payment to him of the said sum of $5,900, in addition to the moneys already received aggregating $2,100,

making $8,000 in all, for all services rendered to and including October 31, 1926.

Respecting the so-called "excess payment of $50 made during the month of August, 1926"; Receiver Lieurance avers that the said Phillip A. Hershey Company drew on account of their fees the sum of only $250 for the month of June, 1926, instead of $300, and that the payment made of the $50 additional in August, 1926, was intended to cover the difference between the amount drawn and the amount to which the company was entitled on account of services for the month of June, 1926. [114]

ANSWERING PARAGRAPH B ON PAGE 4 OF THE WRITTEN OBJECTIONS AND EXCEPTIONS:

Receiver Lieurance avers that he does not know what, if any, information was given the objectors and exceptors concerning any statement made by him relative to the employment of Phillip A. Hershey & Company. But in this connection Receiver Lieurance denies that he stated to a representative of the creditors of the defendant, or to any other person, or at all, that the sole cost of the services of Phillip A. Hershey & Company would be the sum of $300 per month. Whether such purported statement as claimed was reported to the Committee of Creditors of the defendant is not within the knowledge of Receiver Lieurance nor has he any knowledge or information as to the statement "that in reliance thereupon the employment of Phillip A. Hershey & Company upon such terms was tacitly, or (other-

wise), acquiesced in." If such report was made to any Creditors' Committee, or to anyone, it was made upon some unauthorized statement and without the knowledge or consent or approval of Receiver Lieurance.

In this connection Receiver Lieurance avers that he has in his possession copies of the minutes of the meeting of the Creditors' Committee held in New York, on the following dates:

May 28, 1926
May 29, 1926
June 9, 1926
July 23, 1926
Sept. 8, 1926
Oct. 11, 1926
Dec. 3, 1926,

and that no mention is made in any of these minutes of any such report, or of any such nature as the employment of Phillip A. Hershey & Company as accountants for the Western Receivers.

ANSWERING PARAGRAPH C ON PAGE 4 OF THE OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance denies that the services rendered by [115] Phillip A. Hershey & Company were and are of a reasonable value not exceeding said sum of $300 per month, and/or were fully paid and/or adequately compensated for and/or paid prior to the payment of said additional sum of $5,900 on December 31, 1926. And in this connection, Receiver Lieurance avers that he has been reliably informed by auditors and accountants that

the value of the services rendered by Phillip A. Hershey & Company to the Receivers in the administration of the above-entitled estate is greatly in excess of the amount paid the said company.

ANSWERING PARAGRAPH "3. SPECIFIC OBJECTIONS AND EXCEPTIONS TO FINAL REPORT (A)":

Receiver Lieurance denies that the true facts in the premises with respect to the statement set forth in the final report concerning the circumstances under which interim or temporary allowances were heretofore made in favor of Receiver Lieurance and Attorney Eliassen are as set forth in the said objections and exceptions.

ANSWERING PARAGRAPH B ON PAGE 5 OF THE OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance reiterates the fact that "ever since his appointment as Receiver herein he has neglected his own affairs and devoted his time and effort to the administration of the affairs of this estate." Receiver Lieurance reaffirms said statement and denies that such statement is untrue.

ANSWERING PARAGRAPH 2 ON PAGE 5 OF OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance reiterates his allegations contained in the final report and avers that the facts concerning the allowances are as stated therein, and not as stated therein, and as stated in the objections and exceptions. [116]

ANSWERING PARAGRAPH A OF OBJECTIONS AND EXCEPTIONS CONTAINED ON PAGES 6 AND 7;

Receiver Lieurance avers that he never saw the telegram of December 9, 1926, alleged to have been received by certain representatives of the Western Creditors concerning prospective allowances and he cannot therefore either affirm or deny the said representations.

ANSWERING PARAGRAPH B, PAGE 7 OF THE SAID OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance admits that a conference was held on December 9, 1926, at the office of Attorney Joseph Kirk of the San Francisco Board of Trade, at which Mr. Walton N. Moore was present the greater part of the time. It was the understanding of the meeting as suggested that the allowances asked for in the New York jursdiction by Receiver Gotthold and his attorneys, McManus, Ernst & Ernst, Esqs., were excessive. It was not, however, the agreement or understanding that the views of the members of the Western Creditors Committee should be ascertained and presented to the several courts respectively before any action should be taken concerning the allowances to either Receiver Lieurance or his attorney Edward R. Eliassen, Esq. In this connection, Receiver Lieurance avers that the understanding and agreement was that as most of the work in the administration of the estate was done here in the western jurisdictions where all of

the stores of the defendant company were located, and where almost the entire business of the administration was carried on, that the matter of the allowances to the New York Receiver and his attorneys should be deferred until after it could be ascertained what allowances the Courts would make here in the western jurisdictions; it having been expressly and definitely stated by both Receiver Lieurance and his attorney, Edward R. Eliassen, [117] that they desired to have the question of the allowances to them left to the discretion of the Courts in the various western jurisdictions. This fact was well known, not only to attorney Kirk, and Mr. Moore, but also to Receiver Gotthold, and other interested parties. In this connection a telegram from Messrs. McManus, Ernst & Ernst to Mr. Lieurance, dated December 6, 1926, stated:

> "We are applying today for order declaring dividend forty per cent and also for allowances on account to Receivers and ourselves stop This is without prejudice to and cannot jeopardize your application in West for allowances to ancillary Receivers and Eliassen."

Telegram from McManus, Ernst & Ernst to Receiver Lieurance, dated December 7, 1926, states:

> "* * * At request Creditors Committee no allowances were fixed for Receivers or counsel until receiving some indication from you what aggregate amount you and Eliassen will request from Western jurisdictions Stop Will you please wire us approximately what aggregate allowances will be so requested."

Reply telegram of Receiver Lieurance to McManus, Ernst & Ernst, dated December 8, 1926, reads as follows:

> "Replying your telegram December seventh no amount on account for attorneys and Receivers in ancillary jurisdiction will be suggested by us Stop However will ask for allowances on account but amounts will be left entirely to discretion of courts Stop Feel this best and most fair method to pursue Stop Have not slightest idea of what Courts will do but feel they will be fair to both creditors and ourselves."

Telegram from Mr. A. V. Love of Seattle, Washington, to Receiver Lieurance, dated December 8, 1926, reads:

> "William Frazer Chairman Creditors Committee wants my views by wire on full and final compensation for Ernst Gotthold Eliasson and yourself Stop Judge Hand has asked for our views and suggestions please wire me amounts you and Mr. Eliasson expect." [118]

A reply to this telegram was made by long distance telephone, in which Mr. Lieurance told Mr. Love that he did not want to suggest any amount of fees but wanted to leave the matter of the fixation of allowances on account entirely to the discretion of the Courts in the various jurisdictions.

On December 8, 1926, Mr. Gotthold wired Mr. Lieurance as follows:

"I shall be glad to know your view as to allowances to Receivers and counsel as soon as possible."

On December 10, 1926, Receiver Lieurance replied to Mr. Gotthold's wire of December 8th, as follows:

"I purposely delayed replying to your telegram of December ninth requesting aggregate amount fees to be allowed attorneys and Receivers pending result of meeting with San Francisco Board of Trade and Walton Moore held late yesterday afternoon in San Francisco Stop As previously stated Eliassen and myself feel in fairness to creditors attorneys and receivers matter of compensation should be left entirely to Courts without suggestion or recommendation on our part as to amounts Stop This plan will be followed in Ancillary jurisdictions and is supported by Walton Moore, A. V. Love and San Francisco Board Trade Stop Their views and recommendations in this regard were communicated to Mr. Fraser yesterday by wire in reply to his request to them for same as Judge Hand had evidently asked creditors committee for recommendations as to aggregate allowances to be made attorneys and receivers Stop In view of fact that fixation of fees and compensation will be left to courts in western jurisdictions it is impossible for me to even guess at amounts which will be allowed Stop It has been suggested here and evidently at New York also

that you receive your compensation in parent jurisdiction and I look to Courts in Ancillary jurisdictions for my compensation Stop There is no doubt this will simplify matters and keep aggregate amount to be allowed down to reasonable figure as was suggested at yesterdays meeting however no one can foretell how this will work out Please let me have your views regarding this arrangement Stop Application for orders to pay forty per cent dividend and allowances on account will be made in Northwest next week." [119]

Letter received from Receiver Gotthold, dated December 9, 1926, addressed to Receiver Lieurance acknowledging receipt of the telegram of December 8th, and stating:

"I have no doubt that the Courts will act fairly in the matter."

On December 9, 1926, Mr. A. V. Love, of Seattle, a member of the Creditors' Committee sent a wire to Mr. William Fraser, Chairman of the New York Committee, as follows:

"Talked to Lieurance long distance today. He will not suggest amount of fees says will be satisfied with courts order. Think Lieurance compensation should be greater than Gottholds as he has done most of work. Think Ernst suggested fees altogether unreasonable and that all parties should be satisfied with reasonable fees."

On December 9, 1926, Mr. Walton N. Moore sent a telegram to Mr. William Fraser, Chairman of

the Creditors' Committee, a copy of which was sent to Receiver Lieurance, and which reads as follows:

> "Further answering your telegram Receiver Lieurance and attorney intend having each Ancillary Western Court also order dividend forty per cent Stop To avoid possible conflict between Eastern and Western Courts as to amounts of allowances to Receivers and their attorneys as Chairman of Creditors Committee here and member of New York Committee I earnestly request that question of such allowances be deferred for time being until Receivers and attorneys and Committees can exchange views and come to some agreement concerning gross amounts to be asked for Stop Amounts of allowances to Receivers and attorneys at this time by Judge Hand may prove unsatisfactory to ancillary courts who may order different amounts resulting in confusion Stop As you now know from yesterdays telegrams from Lieurance to Gotthold and Attorneys McManus and Ernst Receiver Lieurance and Attorneys in Ancillary jurisdictions intend leaving amounts of allowances to discretion of Ancillary Courts."

Telegram from Mr. Gotthold to Mr. Lieurance, dated December 9, 1926, reads as follows: [120]

> "Suggested interim allowances in New York are ten thousand to Receivers to be divided equally ten thousand to New York counsel Stop New York counsel to make no applica-

tion in Ancillary jurisdictions Stop Figures indicated are satisfactory to Court and generally to creditors but before payment is made we hoped to get some estimate of total allowance so that figure might be kept down to reasonable amount."

A telegram from Receiver Lieurance to Mr. Gotthold, dated December 10, 1926, as hereinabove set out *in toto,* is hereby referred to; the same containing the answer to Mr. Gotthold's wire of December 9, 1926.

ANSWERING PARAGRAPH LETTERED "B" ON PAGE 7 OF OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance with Mr. Eliassen met Attorney Joseph Kirk at his office in San Francisco, with Mr. Walton N. Moore, on the 9th day of December, 1926, at the solicitation of Attorney Joseph Kirk. That at the meeting it was suggested that the allowances asked by Receiver Gotthold and his Attorneys, McManus, Ernst & Ernst was excessive, in view of the fact, that practically all of the business of the administration was being done here in the western jurisdictions under the direction of Receiver Lieurance and Edward R. Eliassen, his attorney, and that the matter of the application at New York for the compensation of the New York Attorneys and Receiver Gotthold should be postponed until after it was determined how much the allowances to Mr. Lieurance and his attorney were to be. Mr. Lieurance and Mr. Eliassen stated that they did not want to name any fees, but that they

desired in fairness to all concerned to have the amount of the allowances on account fixed and determined by the various Courts in the ancillary jurisdictions. Mr. Moore and Mr. Kirk both expressed themselves as being of the opinion that it was fair and equitable, and both Mr. Lieurance and Mr. Eliassen understood at that time, and have [121] understood at all times since, that the plan to follow in the matter was to have the application at New York postponed until it could be learned by our applying to the ancillary Courts in the West what the aggregate allowances to Mr. Lieurance and Mr. Eliassen would be. In other words, it was thought that the amounts allowed here in the Western jurisdiction could equitably be taken as a basis for the amounts to be allowed the Receiver and his New York Attorneys at New York City, where only a small part of the work connected with the work of the administration of the affairs of the defendant Company had been done. Receiver Lieurance in this connection avers that it is not true that the purpose in asking for a continuance of the application matter at New York was to get an agreement concerning the aggregate of the amounts to be allowed the Receivers and their respective attorneys in all jurisdictions. The telegram referred to in Paragraph "B" on page 7 was drafted by Attorney Kirk in his office, in the presence of Mr. Moore, Mr. Eliassen and Mr. Lieurance and was sent in the name of Walton N. Moore to William Fraser, Chairman of the Creditors' Committee at New York under date of December 9, 1926.

This telegram as has already been shown hereinabove, in which Mr. Moore wired as follows:

> "Further answering your telegram Receiver Lieurance and Attorney intend having each ancillary Western Court also order dividend forty per cent. Stop To avoid possible conflict between Eastern and Western Courts as to amounts of the allowances to Receivers and their attorneys as Chairman of Creditors Committee here and member of New York Committee I earnestly request that question of such allowances be deferred for the time being until Receivers and attorneys and committees can exchange views and come to some agreement concerning gross amounts to be asked for. Stop Amounts of allowances to Receivers and attorneys at this time by Judge Hand may prove unsatisfactory to ancillary Courts who may order different amounts resulting [122] in confusion. Stop As you now know from yesterdays telegrams from Lieurance to Gotthold and attorneys McManus Ernst & Ernst Receiver Lieurance and attorneys in ancillary jurisdiction intend leaving amounts of allowances to discretion of ancillary courts."

Referring to the objections and exceptions to the final account of the Receivers, it will be noted that the above telegram is quoted, but that the greater portion of the same is omitted.

Receiver Lieurance further avers that it was the understanding reached at the meeting held at Attorney Joseph Kirk's office in the Board of Trade

Building, San Francisco, on December 9, 1926, that the allowance to be asked for by himself and Attorney Eliassen in the ancillary jurisdictions were to be made forthwith and as shown by Mr. Walton N. Moore's telegram to Mr. Fraser, under date December 9th, that only the allowances to be made to Receiver Gotthold and attorneys McManus, Ernst & Ernst in the jurisdiction of New York, were to be deferred and that such allowances were to be deferred only until after it was definitely known what amounts the Courts in the ancillary jurisdictions would award to Receiver Lieurance and Attorney Edward R. Eliassen. Receiver Lieurance further avers that it was understood that when the Courts had fixed the allowances of himself and Attorney Eliassen, that he would immediately communicate the results to Mr. Moore. The allowances made to Receiver Lieurance and his attorney, Mr. Eliassen, were made in the following order: First, San Francisco; then at Spokane, Washington; then at Seattle, Washington; and last at Portland, Oregon. Immediately following the hearing at Portland, Oregon, Receiver Lieurance, in compliance with his promise, immediately sent a telegram from Portland to Mr. Walton N. Moore at San Francisco, reading as follows: [123]

> "Work completed here this morning Stop Order obtained all jurisdictions pay forty per cent dividends Stop Allowance to attorney California ten thousand Spokane twenty five hundred Seattle five thousand Portland ten thousand total twenty seven thousand five hun-

> dred Stop Allowance to receivers California ten thousand divided seventy five and twenty five percent Spokane five thousand division to be made at final hearing Seattle thirteen thousand divided twelve and one Portland fourteen thousand five hundred divided thirteen five and one total forty two thousand five hundred Stop Phoned above information to Mr Love this morning Will be home Saturday."

And immediately thereafter telephoned the information contained in the above telegram to Mr. A. V. Love of Seattle, Washington. [123½]

That it was well known to Walton N. Moore and Attorney Joseph Kirk that the matter of the fixation of the allowances on account to Mr. Lieurance and his attorney were to be determined and fixed by the courts in the ancillary jurisdictions is evident from the foregoing telegraphic correspondence and also from a telegram sent by Attorney Joseph Kirk from San Francisco to Mr. Lieurance and Mr. Eliassen addressed to them at Seattle on December 15, 1926, in which Mr. Kirk wired as follows:

> "In view of the communication received by Walton N. Moore from Frazer Chairman New York Creditors Committee it is highly desirable that you should not apply for Receivers allowances of Attorneys fees in Western jurisdictions until whole subject matter can be again discussed here upon your return."

Receiver Lieurance avers further that before the meeting at Mr. Kirk's office was concluded Mr. Moore left; that Mr. Eliassen then took up with Mr. Kirk the matter of the proposed stipulation for an order of the United States District Court at San Francisco concerning the filing of creditors, claims in New York. At that time Mr. Eliassen signed the stipulation; told Mr. Kirk that the proposed order was satisfactory as drawn. As we were about to leave Mr. Eliassen told Mr. Kirk, that if agreeable to him, he would present the matter of the application for an order authorizing the dividend and fixing the allowances in San Francisco on the following morning and proceed immediately thereafter to do likewise in the various northern jurisdictions and that Mr. Kirk in reply stated in substance "That's good. And the application so far as the allowances on account of fees are concerned will be for whatever to the Court may seem fair and equitable." And that Mr. [124] Eliassen thereupon said in substance that inasmuch as he would then go out to court in the matter of this application the following morning he would be glad to take a stipulation signed by him and the draft of the proposed order to be based thereon and have it signed. And that in reply Mr. Kirk in substance said, "Very well, that is fine. I will be grateful to you," or words to that effect. This offer on Mr. Eliassen's part to take the stipulation and order with him came after Mr. Eliassen had asked Mr. Kirk if he wanted to be on hand in the morning at the time of the making

of the application and after Mr. Kirk had said, "No, I don't think that is necessary."

ANSWERING PARAGRAPH LETTERED "C" ON PAGE 8 OF OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance denies that in violation of the arrangement and agreement entered into at the conference of December 9, 1926, in said objections and exceptions mentioned, and without notice to, knowledge by, or consent of any of the creditors of the defendant, or any of their representatives respectively, on December 10, 1926, Receiver Lieurance and Attorney Eliassen obtained the allowances mentioned. And denies that immediately thereafter and at divers times until and on December 16, 1926, and under the same general circumstances and conditions, obtained similar allowances in the other western jurisdictions. But in this connection Receiver Lieurance avers that Attorney Joseph Kirk, the legal representative of Walton N. Moore, and representing the objectors, knew on December 9th that Receiver Lieurance and his attorney would apply on December 10th for the order obtained and thereafter without delay they did make similar applications in the other ancillary jurisdictions; that Receiver Gotthold also had such notice; that McManus, Ernst & Ernst, Esqs., of New York, representing the eastern Creditors' Committee and also the [125] Receivers in the jurisdiction of New York, had knowledge of the fact that such application would be made. This

knowledge is largely evidenced by the telegrams mentioned hereinabove.

ANSWERING PARAGRAPH "D" ON PAGE 8 OF OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance having no information or belief upon the subject sufficient to enable him to answer all of said paragraph and basing his denial upon that ground denies that immediately after information was received by representatives of the western committee concerning the allowances, the New York committee for the eastern creditors and/or all of the creditors and/or all of the several committees and/or representatives thereof, so far as known to the objectors and exceptors, vigorously, or in any other manner, or at all, protested against each and/or all of such allowances, not only upon the ground that the same were obtained without notice to any of the creditors but also upon the ground that they were obtained as alleged in flagrant or other violation of the understanding and agreement in said objections mentioned and/or upon the further ground that said allowances were grossly or at all excessive and/or Receiver Gotthold joined in such protest and/or the ground.

ANSWERING PARAGRAPH LETTERED "G" ON PAGE 9 OF OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance denies that the petition presented to the Judge of the above-named court on behalf of the Walton N. Moore Dry Goods Company, accurately sets forth the facts.

ANSWERING PARAGRAPH LETTERED "H" ON PAGE 10 OF OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance is informed by Mr. Eliassen that on the said 29th day of December, 1926, Mr. Eliassen at the request of the objectors' attorney, went to his office in San Francisco and had a conference with him and that he then and thereupon agreed to [126] a reduction in the amount of his allowances on account to the sum of $15,000.00, upon the understanding and agreement that the said sum of $15,000.00 was to be considered as a minimum allowance on account and that the final fee or fees should be made and determined by the Courts in the ancillary jurisdictions. Thereafter Mr. Lieurance entered into a similar agreement with his said attorney and after negotiations as to the form of stipulation and after it was suggested that the form had met with the approval of Attorney Kirk and his client, Mr. Walton N. Moore, Mr. Lieurance and Mr. Eliassen signed stipulations and that the stipulations were then signed by and on behalf of Attorneys B. D. Townsend and Francis J. Heney and sent with those signatures to the office of Joseph Kirk for his signature and the signature of Walton N. Moore. It was promised that the instruments bearing the signatures of Mr. Moore and Mr. Kirk would be in the hands of Mr. Eliassen, representing Receiver Lieurance, that same day. However, so Receiver Lieurance is informed and believes, although Mr. Kirk did sign the stipulation, Mr. Moore several days later refused to append his

signature thereto, stating that the form was not satisfactory to him. And because of his insistence upon a radical change in the form of the stipulation already signed by all of the other parties, the final form of stipulation, after many conferences, was not agreed upon nor signed until sometime on or about the 15th of April, 1927.

ANSWERING PARAGRAPH LETTERED "I" ON PAGE 10 OF OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance denies that the reduction of such allowances in this or in any other jurisdictions was agreed to by Receiver Lieurance and/or Attorney Eliassen under the compulsion of the matters and/or facts set forth in the petition of Walton N. Moore, mentioned in said objections and exceptions and/or [127] that it was not agreed to by them voluntarily, "in the interests of harmony," except as alleged in the sense that Receiver Lieurance and/or Attorney Eliassen desired to placate the objecting and protesting creditors and/or avoid giving them any further offense throuh a litigation of the issues tendered by the petition of Walton N. Moore. Further answering said Paragraph "I" Receiver Lieurance admits that it was stipulated that while Receiver Lieurance and Attorney Eliassen should have the right to make application for further allowances on account of fees and compensation and that any creditor or creditors shall have the right to oppose or contest any applications for fees, but denies that both Receiver Lieurance and

Attorney Eliassen, or either of them, knew that it was the intention of the eastern creditors to interpose objections and/or exceptions to the making of any further allowance in favor of either Receiver Lieurance or Attorney Eliassen. In this connection Receiver Lieurance alleges on information and belief that the eastern Creditors' Committee had expressed itself as being willing to pay to him $22,500.00; that is to say $7,500.00 more than the allowance provided for in the stipulation.

ANSWERING PARAGRAPH LETTERED "J" ON PAGE 11 OF OBJECTIONS AND EXCEPTIONS.

Denies that virtually all of the time involved in the negotiations which resulted in the stipulations hereinbefore mentioned was consumed by the discussions of the historical matters to be inserted in such stipulations by way of preamble. In this connection Receiver Lieurance alleges that there was little time expended in the negotiations of the formation of the stipulations which was said to be satisfactorily formed by Attorney Joseph Kirk and his client, Walton N. Moore, and which were signed by and on behalf of Receiver Lieurance, Attorney Eliassen, Attorney [128] Francis J. Heney and Attorney B. D. Townsend. It was only after the surprise of the positive refusal on the part of Mr. Moore to sign these stipulations in the form which Mr. Lieurance and his Attorney were informed was agreeable to Mr. Moore. That numerous and lengthy discussions took place concerning a form

which would be satisfactory to Mr. Moore. Receiver Lieurance further alleges that despite the fact that because of the arbitrary refusal of Mr. Moore certain recitals were eliminated. The allegations made by Receiver Lieurance in the final report of the Receivers are accurate and correct. And Receiver Lieurance hereby denies that by their final report the Receivers in substance, present the same matters to the Court, which do not accurately state or represent the true facts in the premises.

ANSWERING PARAGRAPH LETTERED "K" ON PAGE 11 OF OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance hereby refers to all of the allegations and denials in his answer and requests that the same be considered in answer to the copy of the petition of Walton N. Moore, marked Exhibit "A," and requests that the denials and allegations in this answer contained be considered with the same force and effect as if set out particularly and at length.

ANSWERING SUBJECT NUMBERED "2" LETTERED "B" ON PAGE 12 OF THE OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance denies that he knew of the primary objects of the institution of receivership proceedings instead of liquidating the affairs of the company in bankruptcy proceedings, or that the receivership proceedings should have continued only sixty days, or that in the event of the inability and

failure of the defendant company to refinance and reorganize its affairs to liquidate the defendant company by means and methods which would reduce the expenses of liquidation which would normally be incurred if effected in the bankruptcy proceedings. And in this [129] connection, Receiver Lieurance denies that all of the same was well known and agreed to by all of the parties, including Receiver Lieurance. Receiver Lieurance also avers that he did not know or that had he been selected and recommended solely by R. A. Pilcher. His information is that he was the selection of all the creditors present at the first meeting of the creditors in New York and that he was strongly urged by Mr. Walton N. Moore to accept the appointment as Receiver.

ANSWERING PARAGRAPH LETTERED "C" ON PAGE 13 OF OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance having no information or belief upon the subject to enable him to answer this paragraph and basing his denial upon that ground denies that the maximum normal fees and/or compensation which would be allowed a trustee or a receiver in bankruptcy, if the affairs of the defendant company had been liquidated in bankruptcy proceedings, would be less than the sum of $10,000.00, covering all jurisdictions.

ANSWERING PARAGRAPH LETTERED "D" ON PAGE 13 OF OBJECTIONS AND EXCEPTIONS.

Denies that the services rendered and performed

by Receiver Lieurance were and are of a reasonable value less than the sum of $10,000.00, covering all jurisdictions. But avers on the contrary, that his services rendered and the results obtained in all of the jurisdictions of the Courts in the western jurisdictions, are of the reasonable value of at least $40,000.00, only $15,000.00 of which has already been paid. By arrangement and understanding Mr. Lieurance has waived any fees to which he might be entitled to in the eastern jurisdictions.

ANSWERING PARAGRAPH LETTERED "E" ON PAGE 13 OF OBJECTIONS AND EXCEPTIONS. [130]

Denies that the reasonable value of the services rendered by him in the Northern District of California was or is the sum of $3,500.00, and having no information or belief upon the subject of the maximum fee in the matter of bankruptcy and basing his denial upon that ground denies that the maximum fee and compensation which would be allowed a trustee or a Receiver in bankruptcy for similar services would be considerably less than such sum of $3,500.00.

ANSWERING PARAGRAPH LETTERED "F" ON PAGE 13 OF OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance reiterates the facts set out in his report and particularly that statement that ever since his appointment as Receiver herein, he has neglected his own affairs and has devoted his time and efforts to the affairs of this estate. And

he denies that he is virtually retired from active business and that he was and is living virtually a life of leisure, which was not materially interrupted by his duties as a Receiver. He denies that R. A. Pilcher was employed by him, but averse that R. A. Pilcher was employed by the New York Creditors' Committee as shown by the minutes of a meeting held by the said Committee at New York on the 9th of June, 1926, which said minutes concerning the said employment read as follows: "The question of compensation to Mr. Pilcher was also discussed and it was resolved that for the present his salary at the rate of $10,000.00 per annum from the date of Receivership should be continued until such time as it is terminated by the Receiver." Receiver Lieurance did not learn of Mr. Pilcher's employment until sometime afterwards when Mr. Pilcher came to California and asked for his salary. Thereupon Receiver Lieurance telegraphed to Receiver Gotthold in New York asking concerning said alleged employment, requesting his views as to whether or not the request of Mr. Pilcher for $750.00 [131] to cover his claim for salary for the month of June, 1926, should be paid. Instructions were thereupon given Mr. Lieurance to make such payment, which was the only payment made by him, which payment together with one more payment was the only money paid in the receivership proceedings by Mr. Lieurance as Receiver to Mr. Pilcher. Mr. Lieurance objected to any further employment and any further payment to Mr. Pilcher for the reason that Mr. Pilcher rendered

no services whatsoever to or for Mr. Lieurance in the administration of the R. A. Pilcher Company.

ANSWERING PARAGRAPH LETTERED "G" ON PAGE 14 OF THE OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance avers that Mr. Pilcher did not arrive at the office of the Receiver Lieurance until the lapse of a period of some four or five weeks from the time of the commencement of said Receivership and that it is not true that a considerable portion of the conferences or that any portion of the conferences between Receiver Lieurance and Mr. Pilcher during the sixty-day period or in the month of August, 1926, were devoted to efforts by Mr. Pilcher to induce Receiver Lieurance to aid him in refinancing and/or reorganizing the defendant company. Mr. Pilcher arrived on June 26, 1926 and left on July 3, 1926, and at no time did he mention the subject of personally aiding the refinancing or reorganizing of his business.

ANSWERING PARAGRAPH LETTERED "H" ON PAGE 14 OF SAID OBJECTIONS AND EXCEPTIONS.

Denies that the western stores were operated only for a period of a few weeks until the several western stores could be advertised for sale, and bids received and the highest bidders respectfully determined, but in this connection Receiver Lieurance avers that all of the stores were maintained and conducted and the business operated as going con-

cerns and that for a period of upwards of five months during which time sales were made over the [132] counter aggregating $499,263.28 and that during the period of operation as aforesaid it became necessary to purchase merchandise in the open market to the extent of approximately $100,000. Following this the sixteen stores of the defendant company were sold for an aggregate of $257,600.00, as confirmed by the Courts. In this connection it is denied that the work of Receiver Lieurance in the administration of this estate was all completed before October 31, 1926, or that since said date virtually no duties have devolved upon Receiver Lieurance in the premises as stated in said paragraph. But in this connection Receiver Lieurance avers that since the 31st day of October, 1926, until the early part of the year of 1927 there was hardly a day which he could call his own as his time was practically all taken up in the matter of the administration of this estate and that since the early part of this year up to the present time he has devoted a large portion of his time to the affairs of this administration and has been unable to make any definite personal plans because of the constant interference of this business.

ANSWERING PARAGRAPH LETTERED "I" ON PAGE 15 OF OBJECTIONS AND EXCEPTIONS.

Admits that in the administration Receiver Lieurance provided himself with all the assistance and facilities required in connection therewith, but

that such assistance did not minimize the amount of his personal labors rendered by him in and about the administration, nor did it take from his shoulders any of the responsibilities, nor did they aid him in the matter of the executive duties devolved upon him in this matter. Mr. Lieurance has no knowledge of the fact that members of the Creditors' Committee rendered him important and valuable assistance and particularly in the matter of formulating the policies and general methods to be pursued, thus carrying out, as claimed, the primary object [133] of reducing the expenses which would have been incurred by a liquidation of the affairs of the defendant company in the bankruptcy proceedings. Receiver Lieurance avers in connection with the foregoing that the assistance and facilities with which he provided himself involved the small amount of assistance consistent with the magnitude of the business and the economical administration thereof. Receiver Lieurance further avers that in order to keep down the expense he has maintained one office in cramped quarters, such office being equipped with only the bare necessities.

ANSWERING PARAGRAPH NUMBERED "3" AS TO ATTORNEY ELIASSEN PARAGRAPH LETTERED "B" ON PAGE 15 OF THE OBJECTIONS AND EXCEPTIONS.

Denies that the institution of such ancillary proceedings did not involve any original labor or research on the part of Attorney Eliassen, or that the

complaints or petitions in such ancillary proceedings were exact copies of the original complaint or petition prepared and/or filed by the eastern attorneys for the Receivers in the original or parent proceedings instituted in the United States District Court for the Southern District of New York, with the addition of appropriate allegations setting forth the facts concerning the appointment of the Receivers in the eastern jurisdictions with permission to institute ancillary proceedings in the western jurisdictions.

ANSWERING PARAGRAPH LETTERED "C" ON PAGE 16 OF THE OBJECTIONS AND EXCEPTIONS.

Denies that virtually all of the legal services required in the ancillary proceedings in the western jurisdictions which were performed by Attorney Eliassen were of a formal nature, or that there were a few collateral or contested matters of minor importance, or that these matters did not involve complicated issues, or required services extending over any considerable [134] length of time, or that they did not involve any considerable portion of the estate, relatively, or otherwise speaking. And Receiver Lieurance upon the information furnished by Mr. Eliassen and upon his information and belief denies that a large part, or a considerable amount of the labor performed by him, consisted of clerical or accounting services, which required only the supervision of Attorney Eliassen and/or were

performed by others employed therefor at the expense of the estate.

ANSWERING PARAGRAPH LETTERED "D" ON PAGE 16 OF THE OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance denies that the actual reasonable value of the services performed by Attorney Eliassen in all of the western jurisdictions, including the Northern District of California is less than the sum of $15,000.00 and/or that the actual reasonable value of all the services rendered by Attorney Eliassen in the above-entitled proceeding in the Northern District of California is considerably less than the sum of $5,000.00, and in this connection Receiver Lieurance avers that in his opinion the services rendered by Attorney Eliassen in all of the four western jurisdictions are of a reasonable value greatly in excess of $15,000.00 and that the services performed by him in the Northern District of California are of a value considerably in excess of $5,500.00. In the opinion of Mr. Lieurance, the entire services of Attorney Eliassen in all of the jurisdictions are of the reasonable value of $30,000.

ANSWERING PARAGRAPH LETTERED "B" OF EXCEPTIONS NUMBERED III ON PAGE 17 OF OBJECTIONS.

Receiver Lieurance having no information or belief upon the subject sufficient to enable him to answer all of this paragraph and basing his denial upon that ground denies that the objectors and ex-

ceptors are credibly informed and/or believe that the New York Committee of the eastern creditors and/or Receiver Gotthold concur in the objections and exceptions and/or [135] the grounds in support thereof as mentioned in said paragraph and/or desire to participate in the hearing of such objections and exceptions. In this connecton, however, Receiver Lieurance is in receipt of and has in his possession a telegram sent by Arthur F. Gotthold, Co-receiver, under date of July 7, 1927, stating that these objections and exceptions were filed before submitting them to him. In this connection Receiver Lieurance further avers that on July 6, 1927, he received a telegram from Mr. Gotthold in which he states that he has just received a copy of the objections and exceptions to Receivers' Final Report with Mr. Kirk's letter explaining proceedings. The objections and exceptions were filed with the Clerk of the United States District Court on June 27, 1927, eleven days before Mr. Gotthold received a copy of such objections and exceptions or explanation from Attorney Joseph Kirk concerning the same.

ANSWERING PARAGRAPH LETTERED "C" ON PAGE 17 OF THE OBJECTIONS AND EXCEPTIONS.

Receiver Lieurance avers that he has always been and is now in favor of economy in the administration of this estate and that he is neither in favor of or opposed to the plan as outlined, but is absolutely neutral and is disposed to comply in every way with

the wishes of the Courts in this regard. In this connection Mr. Lieurance, however, states that he is earnestly desirous of having the administration brought to as speedy a close as possible and that any equitably plan which meets with the approval of the Court, that will expedite the closing of the estate will have his hearty support.

A. F. LIEURANCE. [136]

State of California,
County of Alameda,—ss.

A. F. Lieurance, being first duly sworn, deposes and says: That he is one of the Receivers of the R. A. Pilcher Co., Inc., that he has read and signed the foregoing answer to the objections and exceptions to final account and report heretofore filed and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information and belief and as to those matters that he believes it to be true.

A. F. LIEURANCE.

Subscribed and sworn to before me this 21st day of September, 1927.

[Seal] EDWARD R. ELIASSEN,
Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed Oct. 10, 1927. [137]

[Title of Court and Cause—Cause Equity—No. E.-8846.]

ORDER OF OREGON DISTRICT JUDGE RE APPROVAL OF RECEIVER'S REPORT.

On reading the stipulation of A. F. Lieurance, one of the Receivers on the above-named defendant on the one part and Walton H. Moore Dry Goods Company and others, objectors and exceptors to the final account of said Receiver and the allowance thereof and to the allowance of any further compensation to the said Receiver and his attorney, it is by the Court

ORDERED, ADJUDGED and DECREED that the District Court of the United States for the Northern District of California may pass upon the said objections and exceptions and fix the compensation to said Receiver and his attorney as to the services rendered in this jurisdiction and that when the said order shall be made by the said District Court of the United States for the Northern District of California and shall have become final and shall have been complied with by the said Receiver and his attorneys, that upon prduction of a certified copy thereof, an order may be entered herein discharging said Receiver and exonerating his bond.

Done in open court this 27th day of July, 1927.

R. S. BEAN,
Judge.

[Endorsed]: Filed July 27, 1927.

The foregoing is a true copy of order entered and filed in the above-entitled cause.

Witness my hand and the seal of said court this 27th day of July, 1927.

[Seal] G. H. MARSH,
Clerk.
By F. S. Bush,
Chief Deputy.

[Endorsed]: Filed August 8, 1927. [138]

[Title of Court and Cause—Cause Equity—No. E.-540.]

ORDER OF DISTRICT JUDGE, WESTERN DISTRICT OF WASHINGTON RE APPROVAL OF RECEIVER'S REPORT.

On reading the stipulation of A. F. Lieurance, one of the Receivers of the above-named defendant on the one part and Walton N. Moore Dry Goods Company and others, objectors and exceptors to the final account of said Receiver and the allowance thereof and to the allowance of any further compensation to the said Receiver and his attorney, it is by the Court

ORDERED, ADJUDGED AND DECREED that the District Court of the United States for the Northern District of California may pass upon the said objections and exceptions and fix the compensation to said Receiver and his attorney as to the services rendered in this jurisdiction and that when the said order shall be made by the said Dis-

trict Court of the United States for the Northern District of California and shall have become final and shall have been complied with by the said Receiver and his attorney, that upon production of a certified copy thereof, an order may be entered herein discharging said Receiver and exonerating his bond. [139]

Done in open court this 1st day of August, 1927.

JEREMIAH NETERER,
Judge.

O. K.—FRANCIS J. HENEY,
B. D. TOWNSEND,
JOSEPH KERT,
Attorneys for Objectors.
By L. N. STERN,
Their Attorney.
EDWARD R. ELLIASSEN,
Atty. for Receivers.

The foregoing is a full, true and correct copy of an original order made on the 1st day of August, 1927.

Witness my hand and official seal this 1st day of August, 1927.

[Seal] ED. M. LAKIN,
Clerk.
By S. M. H. Cook,
Deputy.

[Endorsed]: Filed August 8, 1927. [140]

[Title of Court and Cause—Cause Equity—No. E.-4293.]

ORDER OF DISTRICT JUDGE, EASTERN DISTRICT OF WASHINGTON, RE APPROVAL OF RECEIVER'S REPORT.

On reading the stipulation of A. F. Lieurance, one of the Receivers of the above-named defendant on the one part and Walton N. Moore Dry Goods Company and others, objectors and exceptors to the final account of said Receiver and the allowance thereof and to the allowance of any further compensation to the said Receiver and his attorney, it is by the Court

ORDERED, ADJUDGED AND DECREED that the District Court of the United States for the Northern District of California may pass upon the said objections and exceptions and fix the compensation to said Receiver and his attorney as to the services rendered in this jurisdiction and that when the said order shall be made by the said District Court of the United States for the Northern District of California and shall have become final and shall have been complied with by the said Receiver and his attorney, that upon production of a certified copy thereof, an order may be entered herein discharging said Receiver and exonerating his bond.

Done in open court this 26th day of July, 1927.

J. STANLEY WEBSTER,
Judge. [141]

United States of America,
Eastern District of Washington,—ss.

I, Harry C. Clark, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that I have compared the foregoing copy with the original order *in re* discharging of Receiver, in Cause No. E.–4293, Sidney Gilson, Herman Avrutine and Samuel Avrutine, copartners engaged in business as National Garment Co., vs. R. A. Pilcher Co., Inc., in the foregoing entitled cause, now on file and of record in my office at Spokane, and that the same is a true and perfect transcript of said original and of the whole thereof.

WITNESS my hand and the seal of said court this 26th day of July, 1927.

[Seal] HARRY C. CLARK,
Clerk.
By Eva M. Hardin,
Deputy.

[Endorsed]: Filed August 8, 1928. [142]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held in the courtroom thereof, in the city and county of San Francisco, on Tuesday, the 20th day of September, in the year of our Lord one thousand nine hundred and twenty-seven. Present: The Honorable A. F. ST. SURE, District Judge.

[Title of Cause.]

MINUTES OF COURT—SEPTEMBER 20, 1927 —ORDER OF REFERENCE TO MASTER.

Upon motion on behalf of A. F. Lieurance, Receiver herein and Edward R. Eliassen, his attorney, IT IS ORDERED that the petition for settlement and approval of the final account and report of the Receiver, the petition for allowance of further fees and compensation to A. F. Lieurance, Receiver, and to Edward R. Eliassen, attorney for the Receivers, and the exceptions and objections to final account and report to the petition for fees and compensation to the Receiver and his attorney, be and the same are hereby referred to Harry M. Wright, Esq., as Special Master, to take the testimony and report his findings and conclusions thereon to this Court. FURTHER ORDERED that said matters be set for hearing before said Special Master on October 11th, 1927, subject to the convenience of said Special Master. [143]

[Title of Court and Cause.]

REPORT OF SPECIAL MASTER.

To the Honorable the Judges of the Above-entitled Court:

The report of H. M. Wright as Special Master respectfully shows as follows:

On September 20, 1927, this court made its order referring to the undersigned as Special Master the

petition for settlement and approval of the final account and report of the Receiver, the petition for allowance of further fees and compensation to A. F. Lieurance, Receiver, and to Edward R. Eliassen, his attorney, and the exceptions and objections to the final account and report and to the petition for fees and compensation to the Receiver and his attorney, with directions to take testimony and report his findings and conclusions thereon to the court, with the further order that the matter be set for hearing before the Special Master on October 11, 1927, subject to his convenience.

By a stipulation at the outset of the hearing before the Master, it was agreed that I should also return the evidence taken. Furthermore, during the course of the hearing the Receiver, Mr. Lieurance, submitted and filed a report and account supplemental [144] to the final account, and it was stipulated by counsel that this report and account should also be within the matters referred.

The hearing was accordingly set for October 11, 1927, and on that day I was attended by the Receiver, Mr. Lieurance, his attorney, Mr. Eliassen, by Peter J. Crosby, Esq., representing said Receiver and his said attorney, and by Francis J. Heney, Esq., Grant H. Wren, Esq., and C. A. Shuey, Esq., as counsel representing Walton N. Moore Dry Goods Co., and other objecting creditors.

The hearing was had on October 11, 1927, on October 19, 1927, on October 20, 1927, and on October 21, 1927. On the last-named date, on request of Mr. Heney, the matter was submitted on

briefs to be filed within the time stated in the order of submission, and after extensions of time the final brief of objecting creditors was filed with me on January 3, 1928. These briefs are returned with the report.

The testimony was taken in shorthand and transcribed by Edward W. Lehner, John Edward Boys, and Charles R. Gagan, competent and disinterested reporters appointed by the Master. The transcript, consisting of 308 pages, is returned with the report.

Joseph Kirk, Esq., one of the attorneys of record for objecting creditors, was seriously ill during the hearing and died after the conclusion of the hearing. His testimony on certain issues was stipulated into the record by counsel, and part of said testimony, contained, according to stipulation, in a letter from Mr. Wren to the Master, is annexed to the cover of the transcript.

An index of exhibits received is annexed to this report, and said exhibits are likewise separately returned.

The said transcript and the said exhibits, and the depositions of Arthur F. Gotthold and Walter E. Ernst, taken in New York, [145] constitute all the evidence upon which this report is based.

Defendant, R. A. Pilcher Co., Inc., was a corporation engaged in chain-store merchandising, with a head office in New York, but with all its sixteen stores located in California, Oregon and Washington: Three in California, six in Oregon, and seven in Washington (Tr., p. 23). During or shortly prior to the early part of June. 1926, receivership

proceedings were instituted in the United States District Court for the Southern District of New York, which thus became the court of original jurisdiction, and Arthur F. Gotthold, an attorney of New York, and A. F. Lieurance, a resident of Oakland, California, formerly in the chain-store business, were appointed temporary Receivers.

The firm of McManus, Ernst & Ernst appeared in New York as counsel for complainants and for the Receivers. Immediately on notification of his appointment, Mr. Lieurance, for himself and his co-receiver, engaged Edward R. Eliassen, an attorney of Oakland, California, as his counsel, and ancillary bills for the appointment of Receivers for defendant were filed in the Northern District of California, in the District of Oregon, and in the Eastern and Western Districts of Washington, and Mr. Lieurance and Mr. Gotthold were appointed temporary Receivers. The temporary receivership in all jurisdictions was later made permanent.

At the inception of the receivership the possibility was contemplated that defendant might secure new money with which to continue its business and remove the receivership, and accordingly the sixteen stores were continued in operation by the Receivers with Mr. Lieurance in active charge and control. After a period of operation, the hope of securing new capital was abandoned and the sixteen stores were offered for sale as of August 31, 1926, being meanwhile kept operating as going concerns. The sales were [146] confirmed by

the various courts of the ancillary jurisdictions at various dates toward the close of October, 1926.

Prior to November 1, 1926, therefore, the activities of Mr. Lieurance, who admittedly performed the greater part of the work of the receivership, and of his attorney, had to do with the operation and management of the sixteen stores and with the sale thereof. Subsequent to that date his activities had to do with the determination of the claims against the receivership, the payment of dividends, and the details of closing the administration, a considerable part of which had to do with the matters of controversy involved in this reference.

Early in December, 1926, Judge Augustus N. Hand, sitting in the court of original jurisdiction, in New York, ordered the payment of a 40% dividend. At the hearing of New York attorneys for the Receivers, McManus, Ernst & Ernst, asked an allowance of counsel fees for themselves in the sum of $10,000 and gave notice that they would expect a second sum of $10,000 later in the proceedings; they also requested an *ad interim* allowance of fees to the Receivers in the sum of $10,000. The requested fees for New York attorneys and the Receivers met with opposition from Creditors' Committees there, who deemed them excessive, especially in view of the fact that the greater part of the work of the receivership had taken place in the ancillary jurisdictions, and the allowances were deferred by Judge Hand until, if possible, it could be ascertained what allowances would be made in the ancillary jurisdictions.

On December 10, 1926, Mr. Lieurance and Mr. Eliassen, his attorney, appeared before Judge St. Sure in the Northern District of California, obtained an order permitting the payment of a dividend of 40% to creditors and granting allowances to the Receivers [147] and their local counsel, as follows: to Mr. Gotthold $2,500, to Mr. Lieurance $7,500, to Mr. Eliassen, $10,000. On December 11th following Mr. Lieurance and Mr. Eliassen left for the northwest and on December 14th appeared before Judge Webster in the Eastern District of Washington and obtained an order for payment of the 40% dividend and allowance of fees as follows: to the Receivers, to be apportioned on final hearing, $5,000; to Mr. Eliassen $2,500. On the next day, December 15th, Judge Neterer in the Western District of Washington ordered payment of the 40% dividend and made allowances as follows: to Receiver Lieurance $12,000, to Receiver Gotthold $1,000, and to Mr. Eliassen as attorney's fees $5,000. On December 16th Judge Bean in the District Court of Oregon authorized the dividend of 40% and made allowances as follows: to Receiver Gotthold $1,000, to Receiver Lieurance $13,587.51, and to Mr. Eliassen attorney's fees $10,000.

The orders with respect to the dividend and the amounts of the allowances for fees of Receivers and their attorney, Mr. Eliassen were then made known by a telegram dated December 16th from Mr. Lieurance to Mr. Moore and on the same day communicated by Mr. Moore in behalf of the west-

ern creditors to Mr. Fraser, chairman of the eastern Creditors' Committee, in New York, together with Mr. Moore's protest against the allowance of fees (Tr., p. 133).

Meanwhile it had been arranged by telegraphic and written communication between the Receivers, completed December 16, 1926 (Tr., p. 186), that Mr. Lieurance should receive all fees allowed in the ancillary jurisdictions and Mr. Gotthold all fees allowed in the District Court in New York. The allowances made in the western jurisdiction as [148] communicated by Mr. Moore to Mr. Fraser on December 16th were before Judge Hand at the time of allowance made by him on Friday, December 17, 1926 (Tr., p. 135). The Receivers' final account, p. 605, show that on December 18, 1926, an *ad interim* allowance to Receiver Gotthold of $5,000 was paid by the New York Receiver and of $7,500 attorneys' fees to McManus, Ernst & Ernst. The same account (pp. 602, 605) show that there was cash on hand with the New York Receiver of approximately $20,350. It appears from Receivers' Exhibit 1 that on either May 4th or May 10th, 1927 (the documents comprising the exhibit being contradictory as to the date), Judge Hand directed payment of a second dividend of 10% to creditors and fees as follows: to Arthur F. Gotthold a second *interim* allowance on account of his fees as Receiver of $2,500; a second *interim* allowance of $7,500 together with certain disbursements to McManus, Ernst & Ernst on account of services rendered as attorneys for the complainants and

Receivers; a sum of $1,250 to certain attorneys for the defendant; a sum of $5,000 to S. D. Laidesdorf & Co. for services rendered to the receiver as accountants; and to Mr. Fraser, chairman of the Creditors' Committee, for payment to Francis J. Heney for services rendered, $1,500. Subsequently, as appears from the exhibits, after a rehearing, Judge Hand allowed the accountants an additional sum of $2,700, making $7,700 in all. The allowances thus made, totaling $20,745.25, seem slightly to exceed the balance on hand as above stated.

The allowances made to Receivers and to Mr. Eliassen as their attorney in the ancillary jurisdictions become the subject of controversy between Mr. Lieurance and Mr. Eliassen on the one hand, and Mr. Moore representing the creditors and Mr. Kirk and Mr. Heney, their counsel, on the other hand, and finally become the subject of stipulations dated February 1, 1927, which were signed by the parties [149] named and filed in each court of ancillary jurisdiction. Duplicate originals of these stipulations are in evidence as Receivers' Exhibit 12.

The effect of all the stipulations was that the orders fixing fees of the Receivers and of Mr. Eliassen should be amended so that Mr. Lieurance should receive $15,000 with nothing to Mr. Gotthold, it being recited that he had waived compensation in these jurisdictions; $15,000 to Mr. Eliassen; and that these amounts should not be further reduced, but without prejudice to the rights of the Receiver and his attorney to apply for or receive additional

fees, or to the right of the creditors to oppose such additional allowances.

In May, 1927, the Receivers' final account and report was filed in each of the ancillary jurisdictions. In July, 1927, under stipulations between the Receiver and the Walton N. Moore Dry Goods Co. and other objecting creditors, the Court in each of the ancillary jurisdictions made an order to the effect that the District Court of the United States for the Northern District of California might pass upon objections and exceptions to the final account and might fix the compensation to be paid the Receiver and his attorney. The whole matter of the Receivers' final account and the proper compensation, if more than $15,000 each, to be allowed to Receiver Lieurance and to Mr. Eliassen, is thus before this court on the account and the report, the objections thereto filed by Walton N. Moore Dry Goods Co. and other creditors, and an answer to these objections filed by the Receiver and his attorney.

As stated at the outset of the opening brief for the objecting creditors, the only important issues are the amount of compensation due Mr. Lieurance as Receiver, the amount of compensation [150] due Mr. Eliassen as his attorney, and the amount to be approved in the Receivers' accounts for the services of Mr.. Hershey as accountant.

By way of preface, I deem it unimportant whether attorney's fees be taken care of by direct allowance to Mr. Eliassen or by allowance to the Receiver who employed him. The creditors' brief

quotes the Supreme Court of the United States in Stuart vs. Boulware, 135 U. S. 78 to the effect that the latter is the proper practice. Nothing turns on the distinction here, nor do I think it would be error if the Court made the allowance direct to the attorney. It used to be the practice in California in the probate of estates of deceased persons to make an allowance to the executor or administrator for attorney's fees but direct allowances to attorneys have since been authorized by the statute. This Court in many cases has made allowance of attorneys' fees directly to the attorneys of Receivers. The Master is informed that Judge Van Fleet did this in the receivership of the Western Pacific Railroad; in fact, my recollection is that he appointed not only the Receivers but the attorneys for the Receivers also, deeming this a matter of equal importance to the Court. As I say, nothing turns on the distinction here, and I shall recommend the allowance of fees direct to Mr. Eliassen. Furthermore, while the orders of the various courts conferring authority on this court to pass on the compensation of the Receiver and his attorney are not clear in the matter, I shall regard the sums to be awarded as single amounts, to the Receiver and to his attorney, respectively, without attempting a segregation between the amounts to be allowed in the various jurisdictions.

While as above stated, there are only three questions to be decided, the greater portion of the voluminous objections [151] which have been filed have to do with charges by the objecting credi-

tors that Mr. Lieurance and his attorney, in obtaining orders from the various ancillary jurisdictions on December 10, 1926, and the succeeding days, fixing Receivers' and attorneys' fees *ex parte,* were guilty of violation of an existing agreement with Mr. Moore and Mr. Kirk, with duplicity toward these gentlemen and Mr. Gotthold, and with imposition and misrepresentation toward the courts that passed the orders complained of. The Master stated at the outset of the hearing (Tr., p. 2) that after reading the objections and the answer thereto he did not think these questions material in view of the fact that *that* the orders complained of had been subsequently opened for review. Nevertheless the subject matter was opened by Mr. Heney on the cross-examination of Mr. Eliassen (Tr., p. 7). The Master's expressed opinion was referred to by Mr. Crosby, though not in the form of an objection, but Mr. Henry pressed it as cross-examination having a bearing on the weight of the testimony of Mr. Eliassen and Mr. Lieurance regarding the value of their services (Tr., p. 98),—a position amplified in the opening brief, p. 15, by the additional contention that if the charges are true the Receiver and his attorneys are not entitled to compensation for services in opposing the objections and in securing additional compensation, and also as substantiating a request by counsel for the objectors for an allowance of costs and expenses incurred by the objecting creditors. The great bulk of the testimony in this record and of the presentation in the briefs concerns this question of whether the charges of

bad faith are true. I allowed the testimony at the hearing, and I shall pass upon it here, not because I believe my first impression of the materiality of the evidence was incorrect but because charges of so serious a nature against men honored by appointment as officers of the court should not be passed by, whether material to the main issue or not. [152]

The charges of bad faith in securing allowances. These charges concern the result of an interview between Mr. Lieurance, Mr. Eliassen, Mr. Walton N. Moore, and Mr. Joseph Kirk at the latter's office in the rooms of the San Francisco Board of Trade on December 9, 1926. The account as given by Mr. Lieurance and Mr. Eliassen of what took place, and the account as given by Mr. Moore and Mr. Kirk, differ point blank in essential particulars. All these gentlemen are of high standing in the community, and may be assumed to be, as I believe they are, quite sincere in their testimony of what actually took place. The first three mentioned were on the stand; Mr. Kirk's testimony, which, in general, was corroborative of what Mr. Moore said, was stipulated, a form of presentation which was of course lacking in strength in behalf of objectors' contentions since it did not possess the color and detail that might have been expected if cross-examination had been possible. It is the not unusual case where memory of long-past events, especially of conversations, has become impaired and mixed with mental understandings not communicated.

The occasion of the meeting of December 9th was a number of telegrams from New York. On De-

cember 6, 1926, McManus, Ernst & Ernst telegraphed Receiver Lieurance that they were applying that day for an order declaring a dividend of 40% and also for allowances on account of Receivers and themselves without prejudice to any applications in the west. On December 7th they wired him of an order by Judge Hand which, among other things, allowed a dividend of 40% and stated that, at the request of the Creditors' Committee, no allowances were fixed for Receivers or counsel until receiving from Lieurance an indication of the aggregate amount he and Mr. Eliassen would request in the west. He was asked to wire approximately these aggregate allowances (Tr., pp. 111–12). On December 8th a similar telegram from Mr. Love, a member of the Creditors' Committee [153] residing in Seattle, in behalf of the chairman of the Creditors' Committee in New York, with similar request for a wired reply, was received (Tr., p. 112). On December 8th Mr. Lieurance wired New York counsel to the effect that:

> "No account on account for attorneys and receivers in ancillary jurisdiction will be suggested by us. However, will ask for allowances on account, but amounts will be left entirely to the discretion of courts." (Tr., p. 113.)

Also, on December 8th, Mr. Gotthold, the New York Receiver, wired Mr. Lieurance:

> "I shall be glad to know your views as to allowances to receivers and counsel as soon as possible." (Tr., p. 115.)

On December 9th Mr. Love telegraphed Mr. Fraser in New York, chairman of the Creditors' Committee there,

> "Talked to Lieurance long distance today. He will not suggest amount of fees. Says will be satisfied with courts order. Think Lieurance's compensation should be greater than Gotthold's as he has done most of work. Think Ernst suggestion fees altogether unreasonable and that all parties should be satisfied with reasonable fees." (Tr., p. 117.)

On December 8th Mr. Fraser in New York wired Mr. Moore (Tr., pp. 251–2) stating that the Judge had signed an order for a 40% dividend, that the Receivers had applied for a partial allowance of $10,000 to be equally divided, and that the New York attorneys had asked a like amount. He stated that Mr. Ernst had told them he expected to apply for a similar amount later on. He stated that Judge Hand had asked suggestions from the committee, to which they had replied that they could not make a recommendation without knowing the allowances Lieurance and his counsel would seek in the west. Mr. Moore was asked to get in touch with Mr. Lieurance and Mr. Eliassen to determine their charges; and the telegram closed with a suggestion of expedition in these words:

> "Advise results by wire because we want to include your views in recommendation to Judge Hand." [154]

The various telegrams have been quoted as the

occasion for the consultation of December 9th and because in each of them the suggestion of telegraphic reply suggested the advisability of a prompt disposition of the matter.

Mr. Eliassen's version of what took place at the meeting of December 9th will be found at page 98 and following of the transcript, and on cross-examination at page 153 and following: Mr. Lieurance's version being at pp. 219 to 227. The testimony should be read.

Summarized as well as may be, it was to the effect that Mr. Moore and Mr. Kirk thought the allowance asked in New York were excessive since most of the work had been done in the ancillary jurisdictions. Mention was made of the 40% dividend. To their inquiry as to what Mr. Lieurance and Mr. Eliassen would ask by way of fees, response was made that this would be left to the discretion of the various courts without any recommendation by the Receiver of his counsel. Thereupon a telegram was dictated by Mr. Kirk to Mr. Fraser in behalf of Mr. Moore which is deemed by both parties corroborative of their views as to the interview, and hence is set forth here in full.

"December 9, 1926.

William Fraser, % J. P. Stevens Co.,
23 Thomas Street, New York City.

Further answering your telegram. Receiver Lieurance and attorney intend having each ancillary Western court also order dividend forty per cent. To avoid possible conflict between Eastern

and Western Courts as to amounts of allowances to receivers and their attorneys, as Chairman of Creditors' Committee here and member of New York Committee, I earnestly request that question of such allowances be deferred for time being, until receivers and attorneys and committees can exchange views and come to some agreement concerning gross amounts to be asked for. Amounts of allowances to receivers and attorneys at this time by Judge Hand may prove unsatisfactory to ancillary courts who may order different amounts resulting in confusion. As you now know from yesterday's telegrams from Lieurance to Gotthold and attorneys McManus [155] and Ernst, receiver Lieurance and attorneys in ancillary jurisdiction intend leaving amounts of allowance to discretion of ancillary courts.

WALTON H. MOORE." (Tr., p. 118.)

The last sentence in the telegram was added to Mr. Kirk's dictation by Mr. Lieurance (Tr., p. 271). Comment will be made on this telegram later.

The witnesses Lieurance and Eliassen agree that Mr. Moore then left the meeting. They further testify that in the conversation that ensued with Mr. Kirk, reference was made to a certain stipulation and order thereon which he had requested of Mr. Eliassen, and that the orders for the dividend of 40% should be obtained from the ancillary courts promptly, and at the same time the Receiver and his counsel would ask that their compensation be fixed by the various courts. Mr. Kirk agreed that this should be done at once. Mr. Eliassen stated that he

would take the matter up in San Francisco the following morning and invited Mr. Kirk to be present, and Mr. Kirk stated that it would not be necessary. Mr. Eliassen then volunteered to present Mr. Kirk's requested order at the same hearing.

Mr. Moore's version of the interview is found at pages 252 and following. He stated that all present agree that the applications for fees in New York were too high and that Lieurance and Eliassen said there would be no trouble about reaching an agreement between the representatives of the creditors and themselves as to their fees." All were in accord that most of the work had been done in the west, by both counsel and Receiver, and that as to the Receivers' fees the division should be more favorable to Mr. Lieurance, rather than an equal division as proposed in New York. There is much in Mr. Moore's testimony that suggests an assumption on his part, rather than an exact recollection of things said. At p. 254 and following the transcript reads: [156]

Q. What, if anything, was said at that time about which allowances were to be deferred?

A. All allowances. We were asking specifically that Judge Hand defer making any allowances there; and, of course, there had been no applications for allowances out in the west, here, that we knew of.

Q. Was anything said at that time about an application being made out here immediately?

A. No, there was not.

Q. Was there anything said about Lieurance and Eliassen leaving to the courts out here to fix the amount?

A. After conferences with and agreement with the creditors, or an opportunity to the creditors to be present and be heard. It all contemplated an agreement as between the creditors and the Receivers and attorneys.

Mr. Moore thinks, p. 273, that he remained to the end of the conference, but he states it as his best recollection and not as a positive fact, and I was impressed at the time that in this respect his recollection was not absolutely positive. There is no doubt that he did not hear Mr. Eliassen or Mr. Lieurance say anything about applications to be made next day. Furthermore, Mr. Moore's letter to Mr. Fraser of December 10th confirms his testimony as to his understanding of what had been agreed upon. It shows that he was strongly impressed with the excessive character of fees asked before Judge Hand and of the order, and he says: "I was impressed with the fairness of Lieurance's attitude. He expressed a willingness to submit the entire matter to the judges of the ancillary courts to fix the fees. Nearly all of the work has been done out here where the property was located and the results produced by Lieurance have been very creditable. It seems to me that a statement [157] of facts might be prepared by the attorney of Lieurance for submission to each of the ancillary courts, which could have the approval of the creditors as to its correctness, which could be submitted to each

of the courts with the request that the Judges thereof fix the compensation for the work done in his jurisdiction. When these allowances have been made, the whole could then be submitted to Judge Hand with a similar statement and he can then make such additional allowance, if any, as he thinks proper. I am in hopes that correspondence between the receivers and the attorneys may result in some mutual understanding which will avoid conflict, giving them what is their just due and no more." (Tr., p. 257.)

Mr. Eliassen (Tr., p. 285) and Mr. Lieurance (Tr., p. 299) said nothing was said on December 9th about any statement of services being rendered or any discussion had with creditors.

It is evident from Mr. Moore's letter of December 10th that he left the interview of December 9th thinking that his telegram of that date was sufficient to postpone the application in New York and that the subject of fees would be taken up in the west in the indefinite future. In view of the fact that the occasion for the meeting and the burden of it was a criticism by creditors here of the requested allowances in New York, and in view of the further fact that all the wires suggested a prompt determination of fees in the west, with telegraphic response, it seems strange that Mr. Moore did not arrange to his own satisfaction as to the time when this question of western fees was to be determined.

There is nothing in the telegram of December 9th, above quoted, which settles the matter in dispute. It is true that reference is made to a deferring of

allowances to Receivers and their attorneys pending an interchange of views and an agreement concerning gross amounts to be asked for. The language of the telegram in [158] this respect can be understood by either side to this controversy as being consistent to a reference to New York allowances only, as Lieurance and Eliassen understood it, or to all allowances as Mr. Moore understood. It is to be noticed, however, that the concluding sentence added by Mr. Lieurance, to the effect that he intended to leave the whole matter to the discretion of the ancillary courts, is not consistent with any program of prior conference and agreement as to the amounts, with the creditors. Both this and his statement that he did not intend to suggest any amount to the Court was an alternative that plainly was intended to avoid conference with creditors and a possible wrangling as to the amounts to be asked. It was a fair enough proposition since either side might meet disappointment. Apparently Mr. Moore did not appreciate its significance in the entire body of the telegram.

Very likely Mr. Lieurance and Mr. Moore, as business men, might well have thought that a program of submission to the decision of the Courts without suggestion on the part of the Receiver or his counsel was one that could be carried out; but Mr. Kirk and Mr. Eliassen, as experienced attorneys of many years' standing, should have known that in every case where an application is made to a Judge for the fixing of fees he naturally and inevitably makes the inquiry as to what the petitioner thinks

he ought to have so that his mind may have a concrete figure to work upon. So far as Mr. Kirk is concerned, I am led to the conclusion that the intention expressed in the telegram that the Receiver and his counsel would leave the amounts, without suggestion, to the discretion of the Judge involved two things; first, that no prior consultation with creditors was contemplated, and secondly, that the amounts finally granted might rest upon prior inquiry by the Court as to what Mr. Lieurance and his attorney thought proper. [159]

The real ground of complaint on the part of the objecting creditors, if they have any, is that the applications to the Court were made without notice to the objecting creditors. We have, of course, the testimony of Mr. Eliassen and Mr. Lieurance that oral notice of an application the next morning was given to Mr. Kirk and that he did not care to attend; and we have the stipulated evidence of Mr. Kirk that this was not so, and of Mr. Moore that he did not hear it.

It must have been realized by Mr. Kirk, though not necessarily by Mr. Moore, that an application for Receiver's compensation and counsel fees would accompany the order declaring a dividend. This is a natural and the usual practice. All parties were agreed that the orders in the ancillary courts for payment of the dividend should be made at once, so that creditors would receive early payment. If a separate fixing of the fees were contemplated it would either require another journey through the jurisdiction or a postponement until the filing of

the final account. In any event, if it was of importance that the applications should not be made when it might be expected, in the absence of agreement, that they would be made, there should have been immediately prepared a written stipulation covering the question of notice. Mr. Kirk was not entitled to any notice as an attorney of record, and I am forced to the conclusion that it was his duty, rather than that of Mr. Eliassen, to have made the question of notice of these applications a matter of written stipulation if it was a fact that he was not notified by Mr. Eliassen of the presentation the following morning. Courts require written stipulations as evidence of agreements between counsel, not because they believe that witnesses or attorneys will lie about facts but because experience has taught the fallibility of memory as to oral understandings. [160]

What transpired following December 9th can be briefly related. The matter of the dividend was presented to Judge St. Sure on the morning of the 10th and an order was granted accordingly. The question of compensation of Receiver and counsel was presented; the testimony given; the statement made that the amount would be left to the discretion of the Court. The Court asked what had been done in New York and learned that an application for $10,000 for Receiver and for counsel had been made there, and thereupon allowed $10,000 to Mr. Eliassen and $10,000 to the Receivers divided one-fourth to Mr. Gotthold and three-fourths to Mr. Lieurance. Mr. Eliassen and Mr. Lieurance left Oakland De-

cember 11th, and proceeded successively to Spokane, Seattle, and Portland. The orders previously recited were made in those jurisdictions. In each of them the Receiver and his counsel were asked what they desired and the statement made that it was left to the Court's descretion, but on being pressed the Receiver said that he thought 5% of the sales would be proper. The Courts acceded. This history of proceedings in these courts is clearly given by Mr. Lieurance in his testimony (Tr., pp. 243 to 246). See, also, in confirmation of his testimony, his letter dated January 10, 1927 (Tr., p. 292 and following).

Meanwhile Mr. Moore received from Mr. Fraser, chairman of the Creditors' Committee in New York (Tr., pp. 258–60) a letter written December 9, 1926, evidently before Mr. Moore's telegram of that date had been received, in which the writer explained the situation in New York and emphasized the desire of the creditors and of Judge Hand for an understanding with Mr. Lieurance and his attorney. Mr. Moore states (Tr., p. 260) that on receiving this letter he telephoned the office of Mr. Lieurance and learned that he and Mr. Eliassen had gone north; that he visited Mr. Kirk and expressed his suspicion of their good intentions and suspected that [161] they had gone to the ancillary courts to have their fees fixed notwithstanding an agreement made on December 9th that it would be the subject of conference. Considering the apparent harmony which had thus far prevailed and the good opinion expressed by Mr. Moore of Mr. Lieurance, I am at a loss to understand why he was so ready

to assume that there was a violation of any agreement. Even consistent with his belief that there was to be a further conference on the subject of fees, he might readily have assumed, and Mr. Kirk must have advised him, that the procuring of orders for the 40% dividend were matters needing prompt attention. At any rate, he had Mr. Kirk send a telegram on December 15, 1926, to the Receiver or his attorney at Seattle suggesting the desirability that no application for fees be made until the matter could be again discussed upon the Receiver's return. When the telegram was received all allowances had been made except the one in Portland by Judge Bean. The Receiver and his attorney made no reply at that time, obtained the order in Portland as stated, and immediately thereafter, on December 16th, telegraphed to Mr. Moore the aggregate of allowances in all the ancillary jurisdictions (Tr., p. 264). Mr. Moore immediately repeated the telegram to Mr. Fraser in New York, stating that he was astounded that the allowances were had without prior agreement with the creditors, and expressed his opinion that they were excessive. On December 20th a conference was had in San Francisco between Mr. Kirk, Mr. Moore, Mr. Lieurance and Mr. Eliassen, of which Mr. Moore said (Tr., p. 267):

> "We asked an explanation of why, in the face of the agreement we had had at the previous conference, these men had slipped off and without our knowledge had secured an allowance from the courts without any representation of the creditors, and far in excess of any

> amounts that we had contemplated, or that they themselves had expressed themselves as thinking sufficient in the case of the application before Judge Hand in New York. There was much said there, Mr. Heney, ... that I said would not bear repetition. . . . . I think I expressed myself and my conviction [162] of their actions about as freely as I ever did about anything. I told them, I think, it was crooked."

At this and subsequent conferences Mr. Moore and Mr. Kirk insisted that the orders be absolutely set aside, but after prolonged and probably heated negotiations it was finally arranged by the good offices of Mr. Heney and Mr. Eliassen that $15,000 each should be paid to the Receiver and to his attorney as a minimum fee and that the claim for further fees under the orders should be reviewed.

I have stated the facts at some length but as briefly as is possible to afford an explanation of a situation which seems to me rather extraordinary. I have no doubt of the sincerity of Mr. Moore in believing then and now that a further conference as to fees had been agreed upon at the meeting of December 9th and that the obtaining of these orders without further conference and without notice (as he understood) was in violation of that agreement. I think, nevertheless, that Mr. Moore is open to criticism in assuming at once that men of the standing of Mr. Lieurance and Mr. Eliassen would be "crooked," would violate an*d* agreement, and would impose upon the courts of which they were officers.

Such things are not ordinarily done and, moreover, would be futile because courts are most ready to review their orders in case of any charge made of imposition. What Mr. Moore should at once have assumed was that there had been an honest misunderstanding between him and the Receiver and his attorney. Such was undoubtedly the fact. The telegram of December 9th, hereinabove quoted in full, lends itself equally to the interpretation made by each of the contending parties here. Conferences as to Receivers' allowances (implying Mr. Lieurance also) are referred to, but the concluding sentence, added by Mr. Lieurance, that he proposed to leave the amount thereof to the courts, in inconsistent with any prior conferences with [163] creditors. It was not unfair, since he as well as the creditors would take the chance of disappointment in the amounts awarded. I have no doubt, on the other hand, that Mr. Lieurance and Mr. Eliassen were equally sincere in their understanding that no further conferences wth creditors were to be had. Furthermore, in view of Mr. Moore's rather doubtful recollection on the point and the positive testimony of Mr. Lieurance and Mr. Eliassen, I believe that Mr. Moore was not present throughout the conference of December 9th; and the preponderance of the proof is that Mr. Eliassen gave Mr. Kirk oral notice of an intention to make application the next morning before Judge St. Sure and that Mr. Kirk was satisfied that the application be made without his presence.

My conclusion is that the creditors' opposition, so far as it has involved the serious charges against the integrity of Mr. Lieurance and Mr. Eliassen, was not only ill-founded on the facts but ought not to have been made. A review of allowances deemed excessive could readily have been secured without any such charges, and in fact it was secured by agreement readily reached between Mr. Heney and Mr. Eliassen. There is some suggestion in the evidence and in the briefs that Mr. Lieurance did not always make full disclosure to his co-receiver, but I pass that by as having nothing to do with the controversy about the securing of the orders of allowance from the courts. It is my considered view that Mr. Lieurance and Mr. Eilassen are not open to criticism of their conduct in securing the orders of allowance as in these proceedings made; that they violated no agreement with the creditors in doing so and they neither misrepresented to nor considered facts from the courts, nor in any manner imposed upon the courts in securing the orders complained of.

THE FINAL AND SUPPLEMENTAL ACCOUNT, AND THE ALLOWANCES TO HERSHEY. [164]

The Receivers' final account, filed herein on May 19, 1927, is a document of 605 pages. I have not felt it incumbent upon me to attempt an audit of this account or to check the computations. I have concerned myself solely with the objection specifically urged which concerns the amount of charges

of Mr. Philip Hershey, an accountant for the Receiver, which charges were paid by the Receiver as rendered.

I may say at once that I do not agree with Mr. Moore or with counsel for the creditors that an accountant was unnecessary and that the work could have been done by an ordinary bookkeeper at a salary of $200 or $250 a month. Furthermore, the orders of original appointment of the Receivers authorized employment of such accountants as the Receivers deemed necessary, and on August 9, 1926, this Court (and possibly the other ancillary Courts) specifically approved the employment both of Mr. Eliassen as attorney for the Receiver and of Philip A. Hershey & Co. as accountants for the Receiver. Later an order was entered authorizing Mr. Hershey to proceed to New York to examine the books there. If the creditors had thought that an ordinary bookkeeper could do the work, they should have appeared early in the proceedings and raised the question before the work was done by an accountant. The amount of his compensation is, however, a matter that is properly reviewable at this time. The facts, shown by the testimony of Mr. Lieurance and Mr. Hershey, are that he was employed with no fixed contract for his compensation but with a drawing account of $300 per month on account thereof; that this sum was paid from June, 1926, until December, 1926, a total of seven months, or $2,100, and that on December 31, 1926, he presented a bill and there was paid to him a fur-

ther sum of $5,900. This latter is the item specifically objected to by the creditors. [165]

The final account, pp. 52 to 54, which, except for certain earlier items, covers disbursements of the Receiver during 1927, shows no further payment to Mr. Hershey of the $300 monthly but it does show, p. 54, that on May 7th there was paid to him the sum of $2,000. This item is not objected to, but I think because it was not discovered by the objecting creditors. The frame of the account is such that the Receivers' disbursements occur in two widely separated portions of the report. It was discoverable from the index on the first page of the report but was nowhere mentioned in the testimony. I assume an objection to this item though it was not in fact made. The total amounts paid to Mr Hershey were:

$2,100 of monthly advances,
5,900 in December, and
2,000 in May, 1927, thus amounting to $10,000, which is the amount which Mr. Hershey testified (Tr., p. 55) was the reasonable value of his services. I am bound to say that I think the failure of Mr. Hershey, Mr. Lieurance and Mr. Eliassen to expressly disclose to the Master and to opposing counsel the fact that this payment had been made is open to criticism. I*n* was left by Mr. Hershey's testimony with the impression that he had been paid $8,000 for services which he deemed worth $10,000.

However, the fact remains that, on the evidence before me, the amount thus asked and paid was a reasonable sum for laborious services efficiently per-

formed. The only opposing evidence was that it could have been done by a mere bookkeeper, a contention already disposed of; and further, the evidence of Mr. Ernst in his deposition that Mr. Lieurence in detailing his monthly expenses had included Hershey at $300 a month and that Mr. Hershey in a conversation with Mr Ernst in New York had stated that he was on a monthly basis of charge. There could easily have been a misunderstanding between Mr. Lieurance and Mr. Ernst on the theory that Lieurance was giving only his recurrent monthly disbursements. [166] The other suggestion is not so easily reconciled, but must be deemed met by the contrary testimony of both Mr. Lieurance and Mr. Hershey, that the $300 paid monthly was an advance on account of fees.

The Receiver has appended to his supplemental report a statement by Mr. Hershey as to services rendered after May, 1927, and this statement has been the subject of further testimony by Mr. Hershey. It has not been paid by the Receiver, and I therefore have not his judgment expressed by the fact of payment or by testimony on the stand as to the reasonable value of the service. Neither has Mr. Hershey placed any figure on the value of the service, leaving it to the discretion of the Master. It covers, among other things, a two weeks' absence in Oregon and Washington attending hearings on the final account and also attendance on this hearing. I do not think I can take into account the fact that Mr. Hershey was in Ohio on other business when called to attend this hearing I recommend

a further allowance to Mr. Hershey, to be in full of all services, of $750.00 plus $19.71 expressage charges on transportation of records of the receivership from Oakland to this hearing in response to the request of counsel for the creditors, a total of $769.71.

The Receivers' final account and report is therefore approved, except for the supplement thereto covering receipts and disbursements of the New York Receiver as to the correctness of which no evidence was produced; and that is a matter, furthermore, for the New York court to pass on.

The supplemental account and report, filed herein on October 19, 1927, is likewise approved as rendered.

This supplemental report shows a balance on hand of $38,694.76. This sum is obviously a guide since it represents a [167] limit to the further allowances asked for Receivers' compensation and attorneys' fees. It is, moreover, less than such limit since there must be deducted therefrom the abovementioned allowance of $769.71 to Mr. Hershey and any expenses incurred and paid by the Receiver for this hearing, including, for example, reporter's fees, the fees which this court may allow to the Special Master for his services, and allowances, if any, to counsel for the objecting creditors. As regards Special Master's fees, the alternative will be between charging them upon the fund in hand or charging them to objecting creditors, and in view of all the circumstances my recommendation is that they shall be charged upon the fund.

ATTORNEY'S FEES TO MR. ELIASSEN.

The Receivers' brief suggests as reasonable for Mr. Eliassen $15,000 in addition to the $15,000 already received; and for Mr. Lieurance $22,500 in addition to the amount already received. As suggested at the close of the last subdivision of this report, the amount on hand is not sufficient to meet these and other demands upon the fund.

Mr. Eliassen's service is described in detail in a statement of such service received in evidence as Exhibit 2. It is a transcript of a methodically kept office record of the employment of his time, in accurate detail as to the subject of employment and as to days when the work was done though not always specific as to the amount of a day consumed. There were no matters of moment in the nature of contested litigation, but the demands upon his time are shown to have been extensive and for a considerable portion of the period continuous, day after day, and consuming the greater part of the time available to him for his professional work. In the figure to be awarded are amounts due to local counsel outside California, payable by Mr. Eliassen to those attorneys, in [168] the sum of $2,620. Various lawyers gave opinion evidence. Mr. Sooy fixed the reasonable value of the services shown in Exhibit 2 at $42,620; Mr John L. McNab at $36,000; Mr. C. M. Bradley at $25,000 to $30,000; and Mr. Eliassen himself at $30,000. For the objectors Mr. Kreft, Referee in Bankruptcy here, valued the

service at from $20,000 to $25,000; Mr. Hayes, an attorney, formerly referee in Bankruptcy in Oakland, $25,000; Mr. Newmark, an attorney specializing largely in bankruptcy matters, at $20,000; Mr. Heney in his brief, p. 67, says: "A fee of $100 per days for a period of five months would amount to $15,000, and that would certainly be liberal compensation for the routine work which was performed by Mr. Eliassen in this matter." The answer to this suggestion is that a period of five months does not by any means represent the period of service, which continued until the filing of the final report in May, 1927, to take no account of the time occupied in preparing for this hearing. The stores were sold at the close of the five months' period, but after that the claims were determined and a great deal of necessary work done. No doubt the time of employment was prolonged by the controversy as to proper fees. A number of cases are cited from respectable courts, including some from our highest court, as to amounts allowable in those cases for Receiver's fees and attorney's fees Such precedents, despite their source, are of little help. What would have been an adequate fee in 1880 is not helpful in determining a fee to be assessed in 1927. The allowance of $27,500 made in the orders of the ancillary courts which here in effect are under review, are much more cogent as precedents; and those were *ad interim* allowances only, contemplating the possibility of additional allowances at this time, on the close of the administration.

compensation (opening brief, p. 60) for the service performed."

The statute applicable to bankruptcy matters has no binding force upon this court in an equity receivership, though of course it is entitled to consideration as one precedent in the way of a legislative expression of opinion regarding a similar service. I give it, however, very small weight since I am not bound, feeling in this regard much as the Judges of the ancillary courts must have felt when they fixed the compensation in the original orders. I have small sympathy with the idea wihch some Courts entertain that court officers, being at the Court's mercy as to their compensation shall be paid, when their work is done, less than the going value of the services in the commercial world. I have a like lack of sympathy for Courts or Receivers who regard a receivership as an excuse [171] for exorbitant fees far beyond the going rate. A middle ground must be struck. The creditors here were fortunate in getting hold of a man who, having retired to a considerable degree from active business, was free to exercise his undoubted talents for their benefit. He did so, and secured for the creditors what appears to me from my knowledge—not, however, particularly enlightened by the evidence before me—to be a liberal dividend upon their claims. It seems to me to come with ill grace from the creditors to contend in such case for a meager allowance.

It is to be remarked that the allowances made by Judge Hand to the receiver and to his attorneys

in New York, who performed a comparatively small part of the entire service, suggest much higher allowances in the courts of ancillary jurisdiction. In this regard I endeavor to give full effect to the fact that standards of compensation in New York City are and must necessarily be higher for a given service than in western jurisdictions and I have no disposition to criticize the eastern allowances. It is the much greater amount of service and greater accomplishment in these courts that suggests the higher allowances.

It is suggested by the creditors (for example, closing brief, p. 3) that in fixing the compensation of such an officer of the court as a Receiver we must take into account the salaries fixed by law for Federal Judges. I agree that such salaries are one item in the consideration, but they afford very little particular assistance. The salaries of our Judges, while inadequate, have attracted to the bench lawyers who have sacrificed larger incomes at the bar, but against this must be balanced the security of tenure for life, the provision for retirement in old age, and the dignity and responsibility of the office. An occasional employment like that of a receiver can hardly be compared with a vocation for life. [172]

The opinion of the Supreme Court as to compensation to a Master in Chancery has a certain analogy. In the Consolidated Gas Company litigation the Court below awarded to a Special Master for hearing and reports in eight cases $118,000, which figured out on a per diem basis a sum of $418 per day. On appeal this was cut by the Supreme

Court to $49,250 or about $175 per day. The Master was occupied 282 days, which the Supreme Court assumed to be about the equivalent of a year's work. In the opinion, in Newton vs. Consolidated Gas Co., 259 U. S. 101, at 105, the Court said:

> "The value of a capable Master's services cannot be determined with mathematical accuracy; and estimates will vary, of course, according to the standard adopted. He occupies a position of honor, responsibility, and trust; the Court looks to him to execute its decrees thoroughly, accurately and impartially, and in full response to the confidence extended; he should be adequately remunerated for actual work done, time employed, and the responsibility assumed. His compensation should be liberal, but not ex*h*orbitant. The rights of those who ultimately pay must be carefully protected; *and while salaries prescribed by law for judicial officers performing similar duties are valuable guides, a higher rate of compensation is generally necessary in order to secure ability and experience in an exacting and temporary employment which often seriously interferes with other undertakings.*"

Considering the amount of the fund available and all the evidence as to the value of the service, I conclude that a reasonable allowance in full for the services of Mr. Lieurance as Receiver would be the sum of $35,000.00, or $20,000.00 in addition to the $15,000.00 already received.

It is suggested by Mr. Heney, for the objecting creditors, that this Court should make a reasonable allowance to the creditors to cover their costs, including, I presume, a counsel fee. I am not sure that I should consider this subject matter within the terms of the order of reference. The doubt being [173] present in my mind, I feel that the decision should be left with the Court, especially as the elements that will guide the exercise of the Court's discretion are as apparent to the Court as they are the Master. On the one hand there is to be considered the fact that in my opinion the case of the objecting creditors not only lacks substance but I think it ought never to have been pressed. I feel that Mr. Kirk should have advised Mr. Moore to forget his anger. On the other hand, it is proper to say that objectors' counsel, Mr. Heney, has presented unpleasant charges with courtesy and tact, as well as ability. The balance that is left will amount to a sum in the neighborhood of $1,000 or $1,500, a sum hardly capable of division among creditors and therefore of no particular interest to them. Indeed, if I had cut the fees allowed by several thousand dollars in the case both of the Receiver and of his attorney, a fund for further dividend would not be created. As the matter is thus resolved, the question before the Court is whether the small balance remaining shall be transmitted to the New York court, presumably for apportionment between the Receiver and the counsel there, or be applied to the objectors' costs.

It was stipulated at the close of the hearing that

the usual practice of this Court, prescribed by Rule 114, whereby a Master's report is first announced in draft to give opportunity for objections, should be here dispensed with, and the final report filed by the Master when complete.

Summarizing my conclusions:

(1) The final and supplemental reports and accounts of the Receiver should be approved as rendered.

(2) The Receiver should be directed to pay out of funds in his hands:

(a) To Phillip A. Hershey, his accountant, $769.71, in full of [174] all demands.

(b) To Edward R. Eliassen the sum of $15,000.00 in full of all services as attorney for the Receiver.

(c) To A. F. Lieurance, in full of all services as Receiver, the sum of $20,000.00.

(d) To the Special Master herein such reasonable compensation as to this Court shall seem proper for his services herein, not exceeding $1,500.00.

(3) The Receiver shall submit to the Court a final supplemental account of his receipts and disbursements, and pay any balance in his hands and transfer any property other than money in his hands belonging to the receivership as the Court may direct; and thereafter be discharged.

IN WITNESS WHEREOF, I have signed and filed the above as my final report herein, and noti-

fied the parties of my action, this 10th day of January, 1928.

H. M. WRIGHT,
Special Master. [175]

INDEX OF EXHIBITS.

[Endorsed]: Filed Jan. 19, 1928. [176]

[Title of Court and Cause.]

EXCEPTIONS TO REPORT OF SPECIAL MASTER.

The Walton N. Moore Dry Goods Co. and other objecting creditors except to the report, the findings of fact and the conclusions of law of the Special Master as follows:

First: Because the findings in the respects hereunder set out, are not supported by the evidence.

Second. Because the findings, in the respects hereunder set out are contrary to the evidence.

Third. Because the conclusions of the Master in the respects hereunder set out are contrary to law.

1. Except particularly and upon each of the above-mentioned grounds to the finding appearing on page 30 of the report, and reading as follows:

> "Considering the amount of the fund available and all the evidence as to the value of the service, I conclude that a reasonable allowance in full for the services of Mr. Lieurance as receiver would be the sum of $35,000, or $20,000 in addition to the $15,000 already received;"

and also to the conclusions appearing on pages 31 and 32 of the report and reading as follows:

> "Summarizing my conclusions:
>
> (1) The final and supplemental reports and accounts of the receiver should be approved as rendered. [177]

(2) The receiver should be directed to pay out of the funds in his hands:—

* * * * * * * * * * *

(c) To A. F. Lieurance, in full of all services as receiver, the sum of of $20,000";

for the reasons and upon the grounds that the undisputed evidence shows that the assets of R. A. Pilcher Co., Inc., at the time the Receivers were first appointed in New York included $75,000 cash on hand in bank, the entire amount of which was made available to the Receivers for the continuance of the business; together with goods and merchandise on hand in the sixteen stores on the Pacific Coast amounting in the aggregate at cost prices, to the sum of $599,717.72 as shown by an inventory which was taken by the Receivers as of June 21, 1926; and together with fixtures and equipment and leasehold improvements of the aggregate appraised value of $176,215.84 as shown by the statement of the New York auditors; and because the undisputed evidence also shows that during the period of five months from June 3d to November 3d, 1926, merchandise aggregating approximately $100,000 was purchased by the Receivers to replenish stock with funds received from the sales of other receivership merchandise, and that the total sales of merchandise in all the stores during that entire period, including the turnover of merchandise aggregated the sum of $499,263.28, and it is impossible to determine whether or not any actual net profit was made by or through such conduct of

the business of those stores, and also that on August 31, 1926, the Receiver had on hand the sum of $228,178.07 in cash, and that no dividends then had yet been paid to creditors, and that subsequently and at or about November 3d, 1926, all of the stores were sold in bulk in amounts aggregating the sum of $257,600, and that these sales in bulk were made as of August 31, 1926, and that it is impossible to determine from the evidence what aggregate amount of sales of merchandise were made between August 31, 1926, and November 3, 1926, and the sales of the stores were made as going concerns, [178] respectively, and that it appears from the final account of the Receiver herein that the net amount of money which actually came into the hands of the Receivers from the liquidation of the assets, and was available for the payment of creditors and expenses of administration, was the sum of only $466,980.41, and as is shown by the general summary of receipts and disbursements found at page 2 of the final account.

And for the further reason and upon the ground that 5% of said net amount of $466,980.41 would be $23,349.02 only, and that said A. F. Lieurance testified that in his opinion 5% upon the sales of the assets would be a fair and reasonable compensation for the receivers; and that A. F. Lieurance as Receiver has already received $15,000.00 and Arthur F. Gotthold as Receiver has already been paid $7,500.00, thus making a total of $22,500.00 to both Receivers as and for their compensation; and because Receiver Gotthold testified at pages 24 and

25 of his deposition that he was familiar with the details of the work performed by the Receivers in both the western and eastern jurisdictions, and at page 6 of his deposition he testified that "I think $20,000 would be a fair compensation; that is $5,000 in addition to what he has already received," to be paid to A. F. Lieurance as Receiver; and because other and further proper expenses of administration have been incurred in the New York jurisdiction by the Receivers since the hearing before the Special Master herein as is evidenced by the affidavit of Grant H. Wren hereto attached and reference to which is hereby made; and for the further reason and upon the ground that 5% of such sales would be not merely liberal but excessive compensation for both Receivers, under the circumstances shown by the evidence herein, and that would be unfair to the creditors and unreasonable and very excessive to allow such 5% upon the aggregate amount of money received from the turnover of the merchandise during the conduct of this business. [179]

And that the major portion of the aforesaid net amount of $466,980.41 was disbursed by the Receivers prior to this hearing as follows:

Preferred claims	5,816.34
Dividends to creditors	359,836.57
Cash transferred to New York Receiver.	25,000.00
Paid to Attorney Eliassen for services..	15,000.00
Paid to A. F. Lieurance for services as	

Receiver	15,000.00
Fees of Special Master	250.00
Administrative expenses	4,104.22
	$425,005.13
Balance on hand at time of filing second account	$ 41,975.28

The foregoing items are found on page 7 of the final account.

And that there was no important litigation; and that the total amount of creditors claims filed, including both general and preferred or secured, aggregated $751,860.09. Of these the total amount claimed as general was $746,043.75 and the total amount allowed as general was $718,794.12; and the total amount allowed as preferred or secured claims was $5,816.34.

And that the Receivers were not called upon to and did not perform any extraordinary service of any kind, as appears from their own evidence of what was done.

And for the further reason and upon the ground that a very large and substantial part of the work which was properly that of the Receiver personally was performed by Phillip A. Hershey and Edward R. Eliassen and they and each of them have already been paid for the same and the creditors ought not to be required to pay double for such services.

That the oral and documentary evidence upon which this exception is based is as follows:

Receiver's Exhibits 1 to 12, both inclusive.

Testimony of A. F. Lieurance appearing in reporter's transcript at pages 7 to 25, both inclusive. [180]

Testimony of Phillip A. Hershey appearing in reporter's transcript at pages 28 to 39, both inclusive, and also at pages 47 to 54, both inclusive (all under direct examination) and also his testimony under cross-examination appearing in reporter's transcript at pages 55 to 64, both inclusive.

All of the deposition of Arthur F. Gotthold.

All of the deposition of Walter E. Ernst.

Testimony of Edward R. Eliassen under cross-examination appearing in reporter's transcript at pages 96 to 130, both inclusive.

All of the testimony of Walton N. Moore appearing in the reporter's transcript at pages 71 to 90, both inclusive.

All of the testimony of Joseph Kirk appearing in the reporter's transcript by stipulation, as is stated in the Special Master's report.

Also all telegrams, letters and evidence appearing in reporter's transcript at pages 91 to 138, both inclusive.

Also telegram dated June 4, 1926, from McManus, Ernst & Ernst to A. F. Lieurance appearing in reporter's transcript at pages 12 and 13 thereof.

Also telegrams and letters between A. F. Lieurance and Attorneys McManus, Ernst & Ernst appearing in reporter's transcript at pages 13 to 18, both inclusive.

Also all of the evidence appearing in the reporter's transcript, and in the written statements of A. F. Lieurance, Edward R. Eliassen and Phillip A. Hershey which were admitted in evidence by stipulation.

Also all of the reasons and grounds set forth in the opening and closing briefs on behalf of Walton N. Moore Dry Goods Co. and other objecting creditors which were filed with the Special Master and returned to this Honorable Court by him with his report. [181]

2. Except particularly and upon each of the above-mentioned grounds to the finding appearing on page 27 of the Report and reading as follows:

> "Taking into consideration all the circumstances, I conclude that a reasonable compensation to Mr. Eliassen for services to the receiver is the sum of $30,000 or $15,000 in addition to the $15,000 already received";

and also to the conclusions appearing on page 31 and 32 of the Report and reading as follows:

> "Summarizing my conclusions;
>
> (1) The final and supplemental reports and accounts of the receiver should be approved.
>
> (2) The receiver should be directed to pay out of the funds in his hands;
>
> (b) To Edward R. Eliassen the sum of $15,000 in full of all services as attorney for the receiver";

for the additional reasons and upon the additional grounds to those hereinbefore stated that as is stated by the Special Master on page 25 of his report "there were no matters of moment in the nature of contested litigation"; and that the testimony of Edward R. Eliassen under cross-examination shows that he continued to attend to all of his other legal practice during the period of time that he was performing services as attorney for the Receiver, A. F. Lieurance in this matter; and that the period of time during which his constant or active services were required covered a period of only five months, to wit, June 3d to November 3d, 1926, and that much the greater part of his services thereafter arose out of the fact that A. F. Lieurance, as Receiver, and Edward R. Eliassen as his attorney refused to grant the requests of the co-receiver, Arthur F. Gotthold and the attorneys for the Receivers, Messrs. McManus, Ernst & Ernst, and William Fraser as chairman of the general committee representing all the creditors for them and each of them, to state in advance of the fixing of any fees for either the Receivers or the attorneys or any of them, by the New York Court or any of the Courts in the [182] western jurisdictions, what amount of compensation in the opinion of A. F. Lieurance would be fair and reasonable for the Receivers jointly or for said A. F. Lieurance alone as Receiver and/or what amount of compensation would be fair and reasonable for Edward R. Eliassen for his services as attorney for A. F. Lieurance as Receiver; and that said Edward R. Eliassen and

A. F. Lieurance proceeded *ex parte* to secure large *ad interim* allowances to A. F. Lieurance as Receiver and Edward R. Eliassen, as attorney in each and all of the courts in the western jurisdiction; and that the allowances so secured by them respectively were each and all deemed and declared to be excessive by said Co-receiver Arthur F. Gotthold and by Messrs. McManus, Ernst & Ernst, the New York attorneys for the Receivers, and by William Fraser, the chairman of the general committee for all the creditors as well as by Walton N. Moore, the president of the Walton N. Moore Dry Goods Co., who was a member of the general committee representing all of the creditors, and was also the chairman of the local Creditors' Committee in San Francisco; and that thereby as is stated by the Special Master on page 26 of his report "No doubt the time of employment was prolonged by the controversy as to proper fees."

And for the further reason and upon the ground that Messrs. McManus, Ernst & Ernst were employed and acted as attorneys for both the Receivers, and they have already had *ad interim* allowances by the New York Court and have been paid the sum of $15,000.00 and that Walter E. Ernst of said firm of attorneys came to California in the latter part of June, 1926, and held a conference with A. F. Lieurance and Edward R. Eliassen concerning the working out of the receivership, the management of the business incident thereto and the policy to be pursued by the Receivers and the adoption of a uniform plan to be approved by all

parties in interest for the carrying on of the receivership and the improvement of the business and the ultimate liquidation thereof; and that [183] Walter E. Ernst testified as appears on page 6 of his deposition that he believes

> "that much of the added work and effort of Mr. Lieurance was caused by controversial letter writing between the east and west, as to matters which were legal in their aspect and could have been, and I believe should have been, readily decided by either his attorney in the west or Messrs. McManus, Ernst & Ernst in the east, who were attorneys for both Receivers";

and that he further testified as appears on the same page of his deposition that

> "I attended a meeting of the Committee of creditors of R. A. Pilcher Co., Inc., which Committee was duly elected in the latter part of May, 1926. All of the members of the Committee were present, except Mr. Love and Mr. Moore. At the said meeting, which was held in the month of March, 1927, it was unanimously resolved by those present that opposition should be made to the payment of any further fees or allowances to either Mr. Lieurance or Mr. Eliassen";

and that he further testified as appears on pages 8, 9 and 10 of his deposition that

> "I wish to add, if it may aid anyone in comparison of fees, that my office gave its attention to this matter daily from the day we were retained late in May until the end of

1926. That during that time, I took the trip to the west, to which I have heretofore referred, occupying, as I recall it, a little less than three weeks. That there were many appearances in court. That in the year 1927 I appeared before Mr. Cardozo the Special Master on at least twenty occasions for the purpose of taking testimony in the contested claims. That exclusive of court work, there were almost daily conferences with the Receiver in New York. There was correspondence by mail and telegram, with Mr. Lieurance and with Mr. Eliassen. That there was correspondence to the extent of an average of no less than three letters a day with various creditors. That during the month of August of 1926, there were frequent conferences with persons who it was thought could be induced to invest sufficient money to rehabilitate the business. That my office endeavored for about a month in the latter part of the summer of 1926 to induce purchasers to take over the business. That as a result thereof, at the hearing before Judge Hand, for the purpose of disposing of the assets [184] of the corporation, there was approximately ten bidders present, all of whom were responsible and were ready to bid, except for the restrictions that were necessarily placed upon the sale by reason of the notice that was sent from Oakland. That all steps as to policies taken by my firm were taken only after con-

ference with and meeting of the Creditor's Committee."

And for the further reason that there are not sufficient funds left on hand with which to pay the whole of the aforesaid allowances to A. F. Lieurance as Receiver and Edward R. Eliassen as his attorney, respectively, unless the additional proper expenses of administration, which have been incurred in the New York jurisdiction by the Receiver since the hearing before the Special Master herein, are left unpaid.

That the oral and documentary evidence upon which this exception is based is the same as that hereinabove enumerated under the preceding exception.

3. Except particularly and upon each of the above-mentioned grounds to the finding appearing on page 23 of the report and reading as follows:

> "However, the fact remains that, on the evidence before me, the amount thus asked and paid was a reasonable sum for laborious services efficiently performed"; (to wit, the sum of $10,000.00 to Phillip A. Hershey, as an expert accountant)

and also to the finding appearing on page 24 of the Master's report and reading as follows:

> "I recommend a further allowance to Mr. Hershey to be in full of all services, of $750.00 plus $19.71 expressage charges on transportation of records of the receivership from Oakland to this hearing in response to the request of counsel for the creditors, a total of $769.71";

and also to the conclusions appearing on pages 31 and 32 of the report and reading as follows: [185]

"Summarizing my conclusions:—

(1) The final and supplemental reports and accounts of the Receiver should be approved as rendered.

(2) The receiver should be directed to pay out of funds in his hands:

(a) To Phillip A. Hershey, his accountant, $769.71 in full of all demands";

for the reasons and upon the grounds that it was a wholly useless and unnecessary expense to employ an expert accountant in addition to a competent bookkeeper during the entire period of the receivership administration and it appears from the evidence of Phillip A. Hershey himself as well as from that of A. F. Lieurance personally that a good competent bookkeeper was employed and paid to keep and did keep the books for A. F. Lieurance as Receiver at and in the office established by him from the middle of June until the month of December, 1926, or, in other words during the entire time that the business was operated by the Receiver after the first ten days, and that Mr. Hershey was engaged during a period of from five to ten days only in formulating a set of books to be used by the Receiver at his Oakland office, and he testified under cross-examination that he could not state what work, if any, was done by him after those ten days that a competent bookkeeper would not be able to do under the circumstances (Reporter's Transcript, p. 60); and that the only class of entries which he was able

to specify regarding which a competent bookkeeper might need instructions or assistance from an expert accountant were those relating to transfers of merchandise from one of the sixteen stores to some other one or more thereof and which transactions did not involve the payment of any money from one store to the other (Reporter's Transcript, p. 61); and that he had quite a number of other clients, but their affairs were attended to by him during that period; and for the reason that a large part of Mr. Hershey's services consisted of work which could have been done just as well by the competent [186] bookkeeper who was employed by the Receiver during that time at a salary of only $27.50 per week, such as computing the amount of the dividend checks upon the payment of a 10% dividend to creditors and again upon the payment of a 40% dividend to creditors, and in preparing such checks and after they were prepared, by checking the total to see that the total number of checks agreed with the 10% or the 40% respectively of the total amount of the claims filed, as he testified he did (Reporter's Transcript, p. 50); and also such work as checking the daily reports of cash receipts from sales which were made to the Receiver by each store as he testified he did personally every day, instead of permitting the competent bookkeeper to do so, who was employed by the Receiver as aforesaid (Reporter's Transcript, p. 55); and for the reason that Mr. Hershey testified under cross-examination that there is a radical difference between the class of work which requires an accountant and the class

of work which requires merely a competent bookkeeper and that he personally did not employ any accountants regularly in his office but "only from time to time as the occasion arises because accountants are high-priced men to employ and we do not care to have them around when they are not working"; and for the further reason that Mr. Hershey testified that he could not state what portion of his time during the period of his employment was given exclusively to the receivership business (Reporter's Transcript, p. 61); and for the further reason that a very substantial part of the services which were performed by Mr. Hershey as accountant was that of attempting to check the creditor's claims which had been filed with the Receivers with the books of Pilcher & Co., Inc., and entries in which books had not been made after February 28, 1926, and that in doing this work, he "worked with a firm of accountants who were employed by the Receiver there" i. e. in New York City (Reporter's Transcript, p. 41); and meaning thereby the accounting firm of S. D. Laidesdorf & Co., and that this work was done by Mr. Hershey according to his own testimony "in conjunction with the [187] accounting firm in New York" (Reporter's Transcript, p. 46) and because that firm has already been allowed by the New York Court and has been paid by the Receiver Gotthold for the same work, in part, the sum of $7,700.00 as accountants for the Receivers and the trip of Mr. Hershey to New York for the performance of this work consumed 38 days of his time and was wholly

unnecessary; and the amount of $10,000.00 which has been paid to him by A. F. Lieurance as Receiver is, for the foregoing reasons, exorbitant and excessive; and that the services performed by Mr. Hershey which are set forth in the supplemental account of the Receiver and for payment for which the Master has recommended the allowance and payment of the said $750.00 were not such as required an expert accountant to perform and hence are excessive and exorbitant.

That the oral and documentary evidence upon which this exception is based is the same as that hereinabove enumerated under the preceding exceptions.

FRANCIS J. HENEY,
GRANT H. WREN,
C. A. SHUEY,
Attorneys for Walton N. Moore Dry Goods Co., and Other Objecting Creditors. [188]

[Title of Court and Cause.]

AFFIDAVIT OF GRANT H. WREN.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Grant H. Wren, being first duly sworn deposes and says: That he is associated with counsel for the objecting creditors herein; that in this capacity he has been in constant communication with Messrs. McManus, Ernst & Ernst, the attorneys for A. F.

Gotthold, one of the Receivers in the above-entitled proceeding, in New York, and that on or about the 27th day of January, 1928, affiant received from said McManus, Ernst & Ernst, attorneys for said Receiver a telegram, a portion of which reads as follows

> "Three claims aggregating $10,000.00 now pending here before District Court and dividends therefore, must be set aside. Has Lieurance done so Stop Expenses have been incurred here for Master hearing disputed claims and premiums bonds of both Receivers Stop."

That on or about the 8th day of February, 1928, affiant received through the United States mails from said McManus, Ernst & Ernst, attorneys for said Receiver, a letter enclosing copy of [189] communication written by said McManus, Ernst & Ernst, to Mr. William Fraser, Chairman of the Eastern Creditors' Committee, a portion of which letter reads as follows:

> "Another very vital question arises and that is this: there are still approximately $10,000 of claims in litigation for which dividends must be reserved in the event that the Court directs that the claims be good; there are the fees of Mr. Cardozo as Master, and there is a substantial balance due to Mr. Gotthold for moneys which he has personally expended and which I understand to be approximately $1250.
>
> "I do not wish to undertake to fix the fees of Mr. Cardozo as Special Master, but I know that he has done a considerable amount of work, has

decided approximately twenty-five claims, and I think the Court would allow him in the neighborhood of $2500."

GRANT H. WREN.

Subscribed and sworn to before me this 25th day of February, 1928.

[Seal] C. J. DORAN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Feb. 25, 1928. [190]

[Title of Court and Cause.]

MEMORANDUM FOR ORDER CONFIRMING SPECIAL MASTER'S REPORT WITH CONDITION.

ST. SURE, D. J.—With the understanding that Receiver Lieurance and his attorney, Edward R. Eliassen undertake to pay an apparent deficit for expenses of administration incurred at New York, and estimated at $1,700, the exceptions to the report of the Special Master are overruled and the report is confirmed.

March 26, 1928.

[Endorsed]: March 26, 1928. [191]

[Title of Court and Cause.]

ORDER APPROVING AND CONFIRMING REPORT OF H. M. WRIGHT, AS SPECIAL MASTER; FIXING COMPENSATION OF RECEIVER, A. F. LIEURANCE, AND EDWARD R. ELIASSEN, ATTORNEY FOR RECEIVERS, ETC.

The Receivers of the defendant Company having filed in the above-entitled proceeding in the above-entitled court their final account and report of their administration, together with a petition for the fixation of fees and compensation of Receiver A. F. Lieurance and of Edward R. Eliassen, attorney for the Receivers; and similar accounts and reports and petitions having been filed on behalf of the said Receivers in proceedings entitled as above in the United States District Court in and for the District of Oregon (Proceeding No. E.–8846); in the United States District Court in and for the Eastern District of Washington (Proceeding No. E.–4293); and in the United States District Court in and for the Western District of Washington (Proceeding No. E.–540); and,

It appearing that certain creditors of the said defendant Company filed certain objections in each of the said proceedings and in each of the said courts to the said accounts and reports and petitions and that the matter of the hearing on the said accounts and reports and petitions and on the ob-

jections thereto for all said jurisdictions shall be heard and determined by the United States District Court in and for the Northern District of California in the above-entitled proceeding; and, [192]

Hon. H. M. Wright having been appointed by the above-entitled court as Special Master for the purpose of hearing and reporting and finding upon the accounts and reports and petitions of the Receivers in the said proceedings in said jurisdictions, and the objections and exceptions thereto; and,

It appearing that during the hearing before the said Special Master there was filed on behalf of the Receivers a supplemental report and account, which by stipulation of counsel was submitted to be considered within the matters therein referred to; and,

Said Special Master having made and filed and submitted to this Court his report and findings in the premises; and,

Francis J. Heney, Esq., Grant H. Wren, Esq., and C. A. Shuey, Esq., having filed on behalf of certain creditors of the R. A. Pilcher Co., Inc., written objections to the said report and findings of the Special Master; and,

The said matter coming on regularly for hearing on the objections and exceptions to said report and findings, Francis J. Heney, Esq., Grant H. Wren, Esq., and C. A. Shuey, Esq., appearing as attorneys for the objectors, and Edward R. Eliassen, Esq., and Peter J. Crosby, Esq., appearing as attorneys for the Receiver A. F. Lieurance; and the matters in the premises having been duly considered by the

Court and having been submitted to the Court for decision; and good cause appearing therefor;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the objections and exceptions to the said report and findings of the Special Master be, and they are, hereby overruled. [193]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the report and findings of the Special Master, dated January 19th, 1928, in the premises, be and it is hereby approved, ratified and confirmed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

(1) That the final accounts and reports of the Receivers be, and they are, hereby approved, ratified and confirmed as rendered.

(2) That the supplemental account and report filed herein on behalf of the Receivers be, and it is, hereby approved, ratified and confirmed.

(3) That the sum of Thirty Thousand Dollars ($30,000) be, and it is, hereby fixed as the compensation to be paid to Edward R. Eliassen, attorney for the Receivers, in full for his services rendered in the above-entitled matter in the above-entitled Court and in the jurisdictions of Oregon and Washington hereinabove mentioned; that the said Edward R. Eliassen has already received Fifteen Thousand Dollars ($15,000) on account of such services and that the Receiver A. F. Lieurance be, and he is, hereby authorized and directed to forthwith pay to the said Edward R. Eliassen the balance of

Fifteen Thousand Dollars ($15,000) in full for all services rendered as attorney for the Receivers.

(4) That the sum of Thirty-five Thousand Dollars ($35,000) be, and it is, hereby fixed as the compensation of A. F. Lieurance, as Receiver in the above-entitled proceeding in the above-entitled court and in the Courts in the aforesaid jurisdictions of the States of Oregon and Washington; that he has already been paid Fifteen Thousand Dollars ($15,000) on account and that he is hereby authorized and [194] directed to pay to himself forthwith the balance of Twenty Thousand Dollars ($20,000) in full for all services rendered by him as Receiver in the premises.

(5) That Phillip A. Hershey, accountant for the Receivers, be paid the further sum of Seven Hundred and Sixty-nine and 71/100 Dollars ($769.71) in full for his services, and the said Receiver A. F. Lieurance is hereby ordered and directed to pay said sum forthwith to the said Philip A. Hershey in the premises.

(6) That the said Receiver A. F. Lieurance submit to the above-entitled court a final supplemental account of his receipts and disbursements and pay any balance in his hands, together with the sum of Seventeen Hundred Dollars ($1,700) (which said Receiver and his attorney are informed is the apparent deficit for expenses of administration incurred at New York and which said sum they have agreed to pay out of their allowances) to Receiver Arthur F. Gotthold, at New York, and immediately thereafter be discharged.

Dated, this 27th day of March, 1928.

A. F. ST. SURE,
U. S. District Judge.

[Endorsed]: Filed Mar. 27, 1928. [195]

[Title of Court and Cause.]

SUPPLEMENTAL AND FINAL ACCOUNT OF MONEYS RECEIVED AND DISBURSED BY RECEIVERS SINCE FILING OF SUPPLEMENTAL ACCOUNT.

	RECEIPTS	Voucher No.	Amount
1927	Cash on Hand at time of filing Supplemental Account		$38,694.76
Oct. 29	Received from First National Bank Interest 9/28/27 to 10/28/27		63.47
Nov. 28	Same as above, 10/28/27 to 11/28/27		65.63
Dec. 28	Same as above, 11/28/27 to 12/28/27		63.51
1928			
Jan. 28	Same as above, 12/28/27 to 1/28/28		64.54
Feb. 28	Same as above, 1/28/28 to 2/28/28		65.22
Mar. 28	Same as above, 2/28/28 to 3/28/28		50.63
	TOTAL RECEIPTS.....		$39,067.76

Mar. 30	Voluntary Contribution of A. F. Lieurance and Edward R. Eliassen for which any claim is hereby waived.....	1,700.00
	TOTAL RECEIPTS AND CONTRIBUTION	$40,767.76

1927	Disbursements	Voucher No.	Amount
Nov. 2	Central Savings Bank rent	822	$ 90.50
2	Pacific Telephone & Telegraph Co. Telephone service	823	8.71
2	Phillip A. Hershey & Co. Notary fees advanced ..	824	.50
2	Western Union, telegrams	825	1.33
15	Smith Bros., stationery...	826	6.55
30	Globe Indemnity Co., premium on bond	827	400.00
1928			
Mar. 6	Ermah Lanier, stenographer	828	98.65
27	A. F. Lieurance, Receiver's fees paid pursuant to Order	829	20,000.00
27	Edward R. Eliassen, attorney's fees paid pursuant to Order	830	15,000.00

Feb. 24	Judge H. M. Wright, master's fees paid pursuant to Order 831	1,500.00
Mar. 27	Phillip A. Hershey & Co. Accountants paid pursuant to order 832	769.71
	[196]	
Mar. 6	Peter J. Crosby, cash advanced for stenographic work 833	17.00
28	Postmaster Oakland, postage 834	22.64
28	Margaret Mc Pherson, Stenographer 835	44.00
30	Edward R. Eliassen cash advanced for copies of Orders 836	16.00
30	A. F. Lieurance, miscellaneous expenses.....837	31.32
30	Balance remitted to Arthur F. Gotthold, Co-Receiver, New York....838	2,760.85
	TOTAL DISBURSEMENTS $40,767.76	

RECAPITULATION

Balance on hand at time of filing Supplemental Account	$38,694.76
Total Receipts and Contributions Since Filing Account	2,073.00
Total Receipts and Contributions	$40,767.76
Total Disbursements	40,767.76
Balance on Hand	NONE

ARTHUR F. GOTTHOLD and
A. F. LIEURANCE,
Receivers.
By A. F. LIEURANCE,
Co-Receiver. [197]

State of California,
County of Alameda,

A. F. Lieurance, being first duly sworn, deposes and says:

I am one of the Receivers of the R. A. Pilcher Co., Inc., the defendant above named;

The foregoing account being filed as and for a final supplemental account of my administration of the said R. A. Pilcher Co., Inc., is in all respects just and true and according to the best of my knowledge, information and belief, contains a full, true and particular account of all my receipts and disbursements on account of said estate of the R. A. Pilcher Co., Inc., from the time of the filing of the Final Account of Receivers to date; that all items of disbursement were paid in good faith and for

the best interests of the estate and were legal charges against said estate, and that I do not know of any error or omission in said account to the prejudice of any person interested in said estate.

A. F. LIEURANCE.

Subscribed and sworn to before me this 3d day of April, 1928.

[Seal] EDWARD R. ELIASSEN,
Notary Public in and for the County of Alameda, State of California.

[Endorsed] Filed April 5, 1928. [198]

[Title of Court and Cause.]

STATEMENT OF THE EVIDENCE.

Introduced upon the trial of the issues raised by objections and exceptions to final report and final account of the Receivers, and to the allowance of further fees to Receiver Lieurance and Attorney Eliassen.

Proposed by objecting creditors (appellants).

(Upon the trial of the issues above mentioned, A. F. Lieurance, Receiver, and Edward R. Eliassen, Attorney for the Receivers, were treated and mentioned as plaintiffs; the parties who interposed the objections and exceptions were treated and mentioned as "objecting creditors.")

The original hearing was before Hon. H. M. Wright, Special Master in Chancery, to whom the matter was referred, with directions to take testi-

mony and report findings and conclusions thereon. Counsel appearing:

For Plaintiffs: Peter J. Crosby, Esq., Edward R. Eliassen, Esq.

For Objecting Creditors: Francis J. Heney, Esq., C. A. Shuey, Esq., Grant H. Wren Esq. [199]

Mr. ELIASSEN.—For the purpose of this hearing, which is a hearing, as your Honor knows, upon a final account of the receivers and their report, and the petition for a settlement, and for fees, and the objections made by certain creditors to the account and to the report, and to the allowance of fees to the receivers and attorney in the matter, I have, for the purpose of presenting it, associated Mr. Peter J. Crosby, of Oakland; I would like to have the record show that.

The MASTER.—Very well.

Gentlemen, I have taken advantage of the courtesy of counsel in sending me copies of certain of the documents to examine rather cursorily, the petition for allowance of fees to the Receiver and to the attorney, for the exceptions and objections to the final account and report by the creditors, and the exceptions and objections to the petition for fees and compensation to the Receiver and his attorney. I think counsel will agree with me that on this hearing there are a great many issues presented by these documents which are no longer of interest. The correspondence with Creditors' Committees and meetings, etc. do not seem to me to have any importance at this point. What we

have got to do now is to pass upon the report of the Receivers, the final account of the Receivers, and in that respect, as I gather, the chief, and perhaps the only, issue is as to certain auditor's allowances to the firm of Hershey & Co. Counsel will, of course, correct me if I am wrong.

Mr. CROSBY.—That seems to be the purport of the pleading, your Honor.

The MASTER.—Then the next matter is to receive evidence and determine what should be the proper fees to the Receivers now and the fees to the Receivers' attorney or attorneys. I gather from this that the decision of the court on this reference is to be accepted by the courts of the other Western jurisdictions [200] under stipulation and order: Is that right?

Mr. CROSBY.—That is our understanding.

The MASTER.—In the matter of determining fees, I notice in the former order, which was apparently set aside, there was a segregation as between the different jurisdictions. Is that segregation of whatever fees are determined to be followed here in this litigation?

Mr. CROSBY.—That is not our understanding. Our understanding was that it was to be a general allowance for them all.

Mr. HENEY.—Yes. I cannot see any object to be gained by making any severance, because the account has already been rendered and the creditors have all been paid an equal amount *pro rata* on their claims.

The MASTER.—I have also looked through the report since I have been sitting here. I have not read it through. In the prayer the Receiver asked for an order barring claims. I suppose that matter will be referred to me under the order. You may proceed.

Mr. CROSBY.—May it please your Honor, with your Honor's permission and that of counsel, I think perhaps it may be proper at this juncture to make some suggestion as to our course of procedure here; expert witnesses will perhaps be called in here, and we thought that if we presented the account first, and the challenge that is made against the specific items in the account, and that is disposed of, then we proceed with our evidence relating to the services, for the purpose of laying a foundation f*o*ur our questions to experts in reference to fees; if that meets with your Honor's approval, and with counsel's, we would proceed along that line.

The MASTER.—Yes, I think so. Prove your report and your account first. [201]

EVIDENCE INTRODUCED BY THE PLAINTIFFS.

TESTIMONY OF A. F. LIEURANCE, FOR PLAINTIFFS.

A. F. LIEURANCE, called and sworn as a witness for the plaintiffs, testified in substance as follows:

Direct Examination by PETER J. CROSBY.

I am one of the duly and regularly appointed receivers in the matter in which this heaing is being held, and being designated as "In Equity—No. 1707." I am Co-receiver with Arthur F. Gotthold, who resides in New York City. This receivership had its inception in New York City.

I have filed here, on behalf of the Receivers, our final account as such Receivers, together with a report of both Receivers, accompanying that account. I understand that certain objections and exceptions to the account have been filed, and our answer to those objections and exceptions has been filed.

The account presented to me, marked "Filed May 19, 1927," is the final acount of the Receivers in this matter; and the document presented to me and marked "Filed May 19, 1927," is the Receivers' report accompanying that account. Items appearing on pages 601 to 605 inclusive, of the final account, purporting to set forth receipts of the New York Receiver and disbursements by the New York Receiver in this matter, is supplemental to our final

(Testimony of A. F. Lieurance.)

account in the western jurisdiction, by which I mean the eastern and western districts of Washington respectively, the district of Oregon, and the northern district of California.

As to the receipts and disbursements in New York, those are based upon the information I have received from my Co-receiver; and there is an additional list, of further disbursements, which list was received by me from Mr. Gotthold, my Co-receiver, after the final account was made up and filed. I have that with me. (Thereupon the witness produced a letter dated May 11, 1927, entitled "Re R. A. Pilcher Co.," and purporting to be a letter from Arthur F. Gotthold, Co-receiver, addressed to the witness, and which was accompanied by letter dated May 11, 1927, addressed to the [202] witness by Messrs. McManus, Ernst & Ernst, and a document purporting to be an order of court signed by Augustus N. Hand.)

I received all of those through the mail, from Mr. Gotthold. McManus, Ernst & Ernst were the New York attorneys for the Receivers. I also received, in the course of the mail, a letter addressed to me by Arthur F. Gotthold, dated May 27, 1927, entitled "Re R. A. Pilcher Co.," which is now shown to me.

(The letter dated May 11, 1927, together with the purported order of the Court, and with the letter of May 27, 1927, above mentioned, were collectively introduced in evidence as one exhibit, without objection, and were marked as Receiver's Exhibit 1.)

This final account which I have filed here shows

(Testimony of A. F. Lieurance.)

all moneys received by me and disbursed by me, as Receiver, in this matter, in the western jurisdictions; and this account, together with the supplement filed this morning, gives the receipts and disbursements by my Co-receiver in New York, in the New York jurisdiction, according to the reports and information furnished to me by him.

(In answer to an inquiry by the Master, the attorney for the plaintiffs stated that the New York accounts were not involved in the present hearing; and that the supplements pertaining to the disbursements and receipts in the east were offered in evidence for the reason that the final account made reference to some disbursements and receipts in the east, and therefore these supplements were introduced in evidence to "round out that situation"; but that he did not think that it was the purpose of the Court here to pass upon the matters in the east.

Thereupon, it was stipulated by both parties, through their respective counsel, that the matter of the fixation of fees in the western jurisdictions has to do only with the Receiver here and his attorney here; in other words, that whatever allowances are made in the western jurisdictions for fees and compensation, go to the Receiver in the western jurisdictions, and his attorney in the [203] western jurisdictions; whereas, the allowances made in the east go to the attorney for the Receiver there, and the Receiver there.)

(Testimony of A. F. Lieurance.)

(The witness continued.) There is a stipulation between the two Receivers, and which is in writing in the form of telegrams and letters, to the effect that I am to have all of the fees out here, and that Mr. Gotthold is to have all of the fees back there.

I sent $25,000.00 from the money I collected here back to my Co-receiver in New York; this was at the request of the Co-receiver and his attorney; there was no money, apparently, to take care of their expenses,—they said.

The report accompanying my final account reflects the facts in this matter as they are set forth therein.

I have filed herein my petition for the approval of this account, together with my application for fees for myself and for my attorney, Mr. Eliassen. All of the facts stated in that petition are true.

In the objections and exceptions filed here, request has been made for the production by me of certain documents and books of account. I have brought with me to this court my books of account, and my correspondence. The claims that were filed in this matter are filed with the account; and the correspondence in reference thereto were filed with the claims. The documents indicating transactions in all of the conduct of this business are here; Mr. Hershey, who was my accountant, and who kept the books of account in this matter, and carried on correspondence under my supervision, has likewise produced his records of all of these trans-

(Testimony of A. F. Lieurance.)

actions and proceedings; and they are here now ready for inspection by counsel.

Cross-examination by FRANCIS J. HENEY.

The attention of the witness was directed to certain items appearing on pages 595 and 599 of the account, reading, "Southern Pacific Travel Expense," such items aggregating the sum of $776.93; and the account does not show who used the transportation. The [204] witness stated that there were records available which would supply the information requested.

In my report, at the bottom of page 5, there is a statement to the effect that I met Mr. J. C. Brownstone of New York, the largest stockholder of the defendant corporation, in Yellowstone National Park, Wyoming, previous to August 5, 1926, for the purpose of discussing the refinancing of the business. I recall that trip. I made the trip up there for the sole purpose of seeing Mr. Brownstone at his request. On page 591 of the account, there are two items in favor of A. F. Lieurance for "Cash Advanced for Trip" $28.60 and $806.68, a total of $835.28. Those items of expense included all of the expenses for visiting all of the stores; and the trip to Yellowstone was made in the same trip; and that particular time, I spent upwards of two weeks visiting and checking up the various stores and that was the expense in connection with all of it.

At the time I first employed Hershey & Co., I

(Testimony of A. F. Lieurance.)

talked with Mr. Hershey about the employment. I had been appointed Receiver, and I informed Mr. Hershey of that fact, and it naturally followed that there would be some accounting to do; we did not know at the time the extent of that accounting, and I made not exactly an arrangement, but I told Mr. Hershey we would have to have an accountant; that was about the size of it; and he asked for the work; and as the receivership progressed a little bit, his engagement became actual and permanent.

At that first talk, nothing was said by either myself or Mr. Hershey about the amount of his compensation, because we knew nothing about the extent of the work that would be done, or the receivership; and it was some day or two after the first talk before there was anything said about a fee, and then the talk, in substance, was that we did not know what the value of the service or the amount of the work would be, and there was no value that [205] could be fixed on the services; and Mr. Hershey said he would have to have a drawing account because he had office expenses, and had his help to pay, and so on; that constituted the conversation, or the substance of the conversation, at that time. The amount that his drawing account should be, was not discussed at that time. Asked whether there was any "discussion at that time with regard to his standard of charges, or what he would charge," the witness answered: No one knew what the extent of the work would be, and there had not been any work of consequence done up until three

(Testimony of A. F. Lieurance.)

or four days past. After that we did discuss the amount to be paid. That was probably three, or four, or five days, probably five days after we learned something about the receivership.

The talk on that occasion was not definite; the amount was not definitely fixed then, but he would have to have a drawing account; there was no way to fix the amount. I cannot recall just exactly what was said at that time. He would do the work, and whatever was right and fair would be agreeable; that was substantially the talk at that time.

I had conducted a chain of stores prior to that time, and had a pretty fair idea of the character of the bookkeeping work that would have to be done so far as the stores were concerned. I had employed bookkeepers for that purpose, when I was running the stores myself.

Q. At that particular time that you had this talk with Mr. Hershey, was it not the understanding that the committee which had been selected was going to attempt to run these stores for a while, and give Mr. Pilcher an opportunity to raise money from his stockholders to take up the indebtedness and continue business?

A. I was informed that there was some such arrangement in New York. However, just when I received that information I don't know. I do not think it was that early in the receivership.

I did not take the receivership at the request of Mr. Pilcher [206] personally. Mr. Pilcher had been employed by me when I was running a chain

(Testimony of A. F. Lieurance.)

of stores; Mr. Pilcher and I had been associated together in another business,—in the same line of business.

I let Mr. Hershey go ahead with his work, with no understanding between us as to what his compensation would be, until Mr. Walter Ernst came out from New York, and Mr. Ernst asked me how much I would have to pay Mr. Hershey, and I told him I did not know; and then I had a talk with Mr. Hershey about how much he would have to have on account, and he told me he would have to have from $250 to $300 a month, and that month we paid him $250 and he said that was not sufficient to take care of his bills, etc., and I paid him $300 a month, and also paid him $50 back pay for the first month.

Mr. Ernst arrived here about June 30. The $250 paid to Mr. Hershey was not for the month of May. I don't remember when the payment was made but it was made some time afterwards. I could not tell you, without looking it up, whether it was after I had the talk with Mr. Ernst; it will show on the record. After I had this talk with Mr. Hershey, in which he said he would have to have $300 a month, Mr. Ernst asked me about it and I told him Mr. Hershey would have to have a drawing account of $300 a month. There was no further talk between myself and Mr. Ernst about it; he said that was fair enough or something to that effect and the subject was dropped then.

My first conversation with Mr. Hershey in regard to the work for which he was paid $5,900, was about

(Testimony of A. F. Lieurance.)

the time he presented his bill; the date will show on the account, the date it was paid. (The attention of the witness was then directed to the fact that the account showed that the item was paid on December 31, 1926, and the witness answered:) No, there was some talk before that. Mr. Hershey said that he was going to present a bill for his services, and later on he did present it. [207]

I did not have a bookkeeper in each one of these fourteen stores. Accounts were not kept at each one of the stores, excepting that a cashier made daily operating reports to the Oakland office. The only bookkeepers at the Oakland office during the period of the operation of the stores consisted of Mr. Hershey and his assistants. Part of the books were kept in my office, and part of them in Mr. Hershey's office. Our office space was a little cramped, but both offices were in the same building. I do not know how many people Mr. Hershey had at work on the books.

Q. How many bookkeepers did it require to keep the accounts during the operation of the stores?

A. Well, I know that Mr. Hershey had two assistants most of the time. I could not state just how many. I do not know how many bookkeepers it took to keep the books. I know the books were well kept and the information that I wanted daily was provided.

By that I mean that the books were kept in such a shape that any day I knew where I stood by looking at the books. That was my practice when I

(Testimony of A. F. Lieurance.)

was running the chain stores of my own. At that time I had 600 stores.

Q. It is difficult to compare the bookkeeping work of them with these, isn't it?

A. Yes. If you were going to compare the pay of the man keeping the books for 600 stores, you would not object to this account.

Q. I understand there would be some difference. From your experience, what would you say was a fair wage for keeping these books?

A. Mr. Heney, it was not exactly a bookkeeper's job. The accounts would have to be audited, and Mr. Hershey did all of that work and kept the books besides, and did an excellent job, and gave the time that was necessary to keep the books in proper order. So it was not a bookkeeper's job.

Q. A bookkeeper does not have much to do to audit his own books, does he?

A. Anybody can write, but it really takes a pretty [208] good head to tell what to write and where to write, etc.

Q. But any bookkeeper ought to have been able ot run these books, shouldn't he?

A. No, I doubt that—I guess a bookkeeper would, yes.

Q. From your experience, what would you say was a fair wage for a good bookkeeper or an accountant to keep these books?

A. Well, there is a difference between bookkeepers and accountants. You can hire bookkeepers for most any price, but I think when you employ

(Testimony of A. F. Lieurance.)

accountants that do the bookkeeping and accounting work, too, that is a different situation.

Q. In that particular period up to the time you sold out these stores, what necessity was there for having an accountant, as distinguished from a bookkeeper?

A. The work of chain store accounting is complicated.

Q. If you have your daily reports from your stores, what difference does it make whether it all came out of one store, or came from fourteen different stores?

A. There were four different court jurisdictions, for one thing, and there were sixteen stores, and there was interchange of merchandise, and there was everything to complicate the work.

I conducted a business in New York City at one time. I am familiar to some extent with the prices charged by accountants in New York City as compared with those out here in San Francisco. For the same class of men the prices run pretty much the same. I think that the *per diem* charge of a public accountant firm, in New York City, would depend upon the firm, and the nature of the work. I have an idea of what it is in San Francisco, after talking with some men who are in that business, —about five, or six, or seven, or eight dollars an hour, depending upon the nature of the work, and who does it.

Q. Isn't it $25 a day with all of these public accountant firms?

(Testimony of A. F. Lieurance.)

A. That was not the information I received. Before I [209] paid this amount to Mr. Hershey I took the pains to look into the matter through one of the large accounting firms here.

Q. Which ones did you inquire of?

A. Mr. Lilly, of McLaren, Goode, & Co.

Q. Any others?

A. No, just the one at that time.

Q. Can you tell the conversation, the talk that you had with Mr. Hershey at the time this amount of $5,900 additional money was agreed upon?

A. Mr. Hershey felt that he was entitled to payment for his services, and the allowance had been made to the Receivers and the attorneys, and it was quite evident that Mr. Hershey was entitled also to his payment, and he said he was going to present his bill, and it would be $5,900, and I gave it consideration and, in proper time, paid it; I was satisfied in my own mind that it was a reasonable charge, very reasonable for the work done, and I confirmed that by communicating with Mr. Lilly, of McLaren, Goode & Co.

Q. So that you did not have any discussion with him other than what you stated in regard to the $5,900? A. Nothing that I recall.

Q. He did not explain to you how he reached the figure of $5,900?

A. I couldn't state definitely the conversation. There has been some conversation about hours, and the basis of the charge, but I do not recall that sufficiently to give any accurate testimony on it.

(Testimony of A. F. Lieurance.)

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(Testimony of A. F. Lieurance.)

I sent Mr. Hershey for the purpose of straightening it out, and he collected $600 that was being carried as an I. O. U. in the till by the manager, and that straightened up the affairs of the store; he also went to Bremerton, Washington, where there was a discrepancy, and reported the condition to me, and straightened that out.

While Mr. Hershey was gone on that trip, I was kept in touch with him as to the discoveries that he was making; and as a result of those discoveries, I instructed him exactly what to do. There were some employees discharged; the manager at Portland was changed.

Q. Now, from your experience in matters of this kind, and your knowledge of the services rendered by Mr. Hershey, state whether or not the sum that you have paid him in the aggregate for his services rendered is reasonable?

A. In my judgment, it is nominal.

(In answer to a question by the Master:) The period of Mr. Hershey's employment was from June 3 up to,—the active management was up to about April, some time in April, when the last dividend was paid,—on up until the books were closed.

Redirect Examination Resumed by Mr. CROSBY.

Q. State whether or not Mr. Hershey kept a separate set of books for each separate jurisdiction?

A. He kept a separate book for each individual store, which had to be done, because merchandise was being transferred. We found in some locali-

(Testimony of A. F. Lieurance.)

ties that merchandise contained in the stores was not adapted to that particular locality, and they could not dispose of it at any price, but we could dispose of that merchandise in some other locality to advantage, and that [212] merchandise was transferred, and the stores were operated to the very best advantage; and that necessitated the keeping of individual books and that resulted in jurisdictions being kept separately.

There were three stores in the California jurisdiction; six in the Oregon jurisdiction; and seven in the Washington jurisdiction.

Recross-examination by Mr. HENEY.

The stores in the western district of Washington were sold October 30, 1926. The stores in the eastern district of Washington were sold about the same time; they were all sold about the same time, as rapidly as we could make the circle around. We advertised for bids, and made a strenuous effort to get bids; and all of the stores were sold on private bids. The Oregon stores were sold about the same time.

The California stores were sold first, about the 23d or 25th of October; and then immediately we proceeded right on up; and the stores up north were sold October 30th.

Since about November 3, 1926, there has been no store operated at all.

Q. So that the bookkeeping was reduced to the proposition of merely looking after the payment of dividends, etc.?

(Testimony of A. F. Lieurance.)

A. Well, after that the bookkeeping in connection with the administration was handled after the stores were sold, that is, the payment of dividends, and the auditing of the claims, and the auditing of the books of account, and the checking up with the claims—that was all done after the stores had been sold.

This trip to New York was made after the stores were sold, I think in November and December. That trip was for the purpose of going over the books of the company and bringing the accounts up to date, and checking them up with the claims, and doing whatever was necessary to get the accounts reconciled with the claims, and know where we stood. I had never been able to get that information from [213] New York. I had repeatedly tried and they told me it was not ready.

Prior to that time, there were some claims that had been contested. The most of the claims were contested, if I remember correctly, after the accounts were audited, which was after the sale of the stores. There had been quite a lot of litigation previous to that by some who had filed claims, and filed suits, and threatened suits; there were any number of threats. That was not all in New York; there was quite a lot of it out here on the coast; there was some in New York, too.

Q. Mr. Hershey, in the trip up north, at the time that he got that $600, that was a matter that he was acting as a sort of Receiver, was it not, more than an accountant? A. No, I do not think so.

(Testimony of A. F. Lieurance.)

Q. Did he change the manager up there at Portland?

A. He went up there to check up the accounts, or to check up the store and the cash and make an investigation of the conditions.

Q. Who selected the new manager?

A. That might be difficult to define; I had seen the man in the store; I was not particularly acquainted with any of them, but I was very favorably impressed with that man when I saw them, and Mr. Hershey recommended that in his opinion, he knew this chap, he felt this chap was all right, and I instructed him to appoint him manager. So, to say that I selected him might be not entirely correct.

Q. You jointly selected him?

A. Yes, you can call it that, if you like. [214]

Mr. CROSBY.—Your Honor, on the question of the payment of $5,900, we are in this position: We have gentlemen here, members of the Bar, whom we expect to call on the matter of these fees, but I assume that it would be proper for us to introduce some evidence concerning the reasonableness of Mr. Hershey's charge. This charge is attacked from two standpoints, one as appears in their objections and exceptions, that by reason of an alleged original contract between the Receiver and Mr. Hershey, that Mr. Hershey's charge should be limited to $300 a month; secondly, that the charge is unreasonable. Now, we have Mr. Hershey present, and we

have men competent to testify in regard to the value of his services, which would take us at least the rest of the morning—I see it is twenty minutes after eleven now—there is one further point, Mr. Heney, with your permission, in order, perhaps, to hurry the matter along, Mr. Eliassen has here a transcript practically of his office records of his services in this case; he has it in such a form that he can hand one to your Honor and one perhaps to counsel and in lieu of putting on the oral testimony and reading it all into the record for the purpose of formulating a hypothetical question, if counsel would consent that we thus save time by tendering that transcript, it would save us a great deal of time. Would you do that, Mr. Heney?

Mr. HENEY.—I am always willing to save time. I am perfectly willing to do that.

Mr. CROSBY.—Thank you very much.

The next proposition is that from the standpoint of Mr. Lieurance, one of the Receivers here, the question of whose fees is before your Honor, he has likewise reduced to writing a history of his services in this matter. There will be no experts called in support of his charge. We would gladly tender to counsel also that statement if you would be content to receive it, and that, [215] perhaps, would save us going through in detail the various matters. He could be cross-examined upon them, no question about that.

Mr. HENEY.—The question is, without knowing anything what is in it, I feel a little bit reluc-

(Testimony of A. F. Lieurance.)

tant to do so. As an attorney, I am familiar enough with the nature of that business, myself, and would feel competent to cross-examine upon that without looking at the report, but the other I would have to give some attention to.

The MASTER.—The cross-examination can be deferred as long as you like, Mr. Heney. I do not see how you could cross-examine on a document handed to you without examining it at your leisure.

Mr. HENEY.—Yes, your Honor.

The MASTER.—Have you seen this document of Mr. Eliassen?

Mr. CROSBY.—We have several, and we will turn one right over to Mr. Heney, and will hand one to your Honor.

The MASTER.—Is this statement of services of Mr. Eliassen to be taken as an exhibit now, Mr. Heney? Do you want it formally proved by Mr. Eliassen?

Mr. HENEY.—Not if he says it is correct.

Mr. CROSBY.—There are just one or two pages that need to be added to it. I will not offer this until we come to that phase of the case.

Redirect Examination by Mr. CROSBY.

A general statement, in writing, by A. F. Lieurance, purporting to state in detail the services rendered by him as Receiver, was offered by the plaintiffs and received in evidence, without objection, with the same effect as oral testimony, and subject to the right of cross-examination, concerning the

(Testimony of Phillip A. Hershey.)

matters contained therein; and such statement was identified as Receiver's Exhibit 3. (See Transcript, pp. 26, 27, 86.) [216]

TESTIMONY OF PHILLIP A. HERSHEY, FOR PLAINTIFFS.

PHILLIP A. HERSHEY, called and sworn as a witness, for the plaintiff, testified, in substance, as follows:

Direct Examination by Mr. CROSBY.

My business is that of a public accountant and auditor. I have been engaged in that business for the past five years, with office at 1401 Central Bank Bldg., Oakland, California. I am acquainted with Mr. Lieurance, one of the Receivers in this matter. I have been in his employ while he has been Receiver, in connection with the R. A. Pilcher Co. receivership. I entered that employ about June 3, 1926.

As I entered upon the work connected with that employment, I did such things as were necessary to secure to the Receiver information relative to the assets of the company, those assets being scattered over three western states. I did work as it was required, at the moment that it arose. There was no going accounting system, and it was necessary that one be installed.

Q. Now, what books, if any, did you open in reference to this business, and for the purpose of conducting the accounting phase of it?

(Testimony of Phillip A. Hershey.)

A. I opened journals, in which were recorded the sales of stores, the cash that was received, the checks that were drawn, the bank deposits that were made, the petty cash expenditures, the merchandise purchases, the merchandise transfers, and a general journal for the entry of such items as would not appear in the previous journal; also set up a general ledger for each of the stores; also set up a set of books for the offices of the Receiver, those books consisting of the journals before mentioned, and also a journal and ledger for that general office.

Q. Now, at the beginning, what, if any, information did you obtain, and where, with which to start the books?

A. It was necessary to immediately communicate with the stores of the defendant company and secure from them bank statements closing June 3, that being the date of the receivership, to reconcile those bank accounts, [217] to locate any items that had been misplaced or lost in transit, to reconcile the cash accounts of those stores, and to inform those stores under Mr. Lieurance's direction as to how they should, in the conduct of the receivership, make their reports to the Receiver.

Q. In the reports that you received from these various stores, did you discover any errors or discrepancies?

A. There were many errors discovered in these cash reports, due to carelessness in transposition of figures and additions; such errors and discrepancies were immediately corrected by correspondence

(Testimony of Phillip A. Hershey.)

with the store managers. All of these errors and discrepancies were taken up daily with Mr. Lieurance and under his instructions and directions the stores were communicated with, the store managers, and the errors corrected while they were yet fresh in the minds of the managers who made the reports. In numerous cases, they would write down that they had paid out an amount to so and so, or to some express company in a certain amount; they did not tell us whether that was express or drayage, or they did not explain the nature of the item. We required a direct explanation of every item that was paid out of their petty cash. Some items they did not explain to us we required an explanation immediately.

Q. Now, what, if anything, was done with regard to preparing an inventory from these sixteen stores that you have mentioned?

A. Acting under the direction of Mr. Lieurance, an inventory of the sixteen stores was taken, concurrently, on June 21, 1926, those inventory slips bearing the lot number, the number of items, the designation of as to whether it was dozens, gross, cartons, etc., a description of the items, its cost price and its selling price, were made, then the slips were sent to Oakland, and there they were computed, the computations verified, the additions checked, and the total inventory made.

In these computations and checking, etc., I worked in daily conjunction with Mr. Lieurance, and also with Mr. Sullivan, who was [218] here, a buyer

(Testimony of Phillip A. Hershey.)

of the defendant company, and primarily, though, with Mr. Lieurance. We were engaged approximately eight days and nights consecutively, in reducing these inventories to a definite figure. The occasion for working at night upon that work was that Mr. Lieurance wished that inventory computed at the earliest possible moment. The receivership was to be made permanent, if it was to be made permanent, on the 5th of July. Mr. Walter Ernst was in California at the time, and he likewise wished the inventory to be computed as fast as possible.

Q. How many people did you have assisting you in your office in that particular work?

A. In that particular work there were in the office of the Receiver, I should say, without direct reference to the books, 12 or 14 people, who were working on the computation of this inventory.

Q. Were they in your employ?

A. They were in the employ of the Receiver.

In making these computations, we had mechanical apparatus; we attempted to rent mechanical apparatus from the Comptometer Company, and they told us they would charge us $5 a day for each machine, and we needed fifteen machines, and we were trying to keep expenses down as much as possible, and because I am in public accounting practice I borrowed these machines from them, and the Receiver paid a nominal rental of $20 for the fifteen machines for eight days.

The inventory as finally computed was $599,717.72.

(Testimony of Phillip A. Hershey.)

Those stores were being conducted as live and running stores; and during the period that they were so conducted, there was merchandise being bought and sold. It was a part of my business as an accountant there, to receive invoices.

Q. And the various managers of the different stores, did they buy directly the goods that they obtained, or did they make a sort of a requisition through Mr. Lieurance for those goods?

A. The [219] store managers were directed by Mr. Lieurance at the beginning of the receivership to order no merchandise. He likewise instructed as many firms as it was possible to do by word of mouth and by communication from managers not to ship any merchandise on any order, unless it bore a stamp and a signature authorizing the purchase of that merchandise by the Receiver. He likewise instructed these store managers to make a purchase order and send their purchase order to him for his approval and authorization. Those purchase orders came in to the office in Oakland. The total amount was computed. That was added to the previous purchase orders sent in by the stores, and daily conference during the course of the receivership was held with Mr. Lieurance regarding whether it was advisable to allow a purchase by certain stores based upon the sales that they had been making previously.

Q. Did those orders, or preliminary orders that thus came first to Mr. Lieurance, pass through your hands?

(Testimony of Phillip A. Hershey.)

A. They passed through my hands, yes.

For instance, Mr. Lieurance would take a purchase order of goods coming from one of the stores, and examine it and check it to determine as to whether or not he would consent that that order go through. Upon numerous occasions, he struck out from the orders, some of the proposed purchases. After he had examined the order, and cut some of it out, we would make a record of it.

Q. Subsequent to the passing of that order through, and its going on to the business house from which the purchases were to be made, was any further record of that transaction brought back to you?

A. It was to this extent, that the purchase order authorized bore a notice to the house from which the goods were being purchased that duplicate invoices should be mailed immediately to the Receiver's office in Oakland, and that the original invoices should accompany the goods—the original invoice went to the store, the merchandise was checked in on that invoice, the invoice then bore [220] the approval of the store manager that that merchandise had been received, and mailed by him to Oakland. It was there checked back against the purchase order, to see that the goods which had not been ordered had not been placed upon the invoice, and to also see if the price was correct.

Q. Did you make those examinations with those invoices, or did Mr. Lieurance, or did both of you?

A. I made the examination of the mathematical

(Testimony of Phillip A. Hershey.)

part of the invoice, and if there were any errors we immediately conferred, that is, Mr. Lieurance and myself, regarding these errors, and corrected them at once.

Q. You mentioned something about transfers of merchandise; state what you mean by that.

A. I might give an illustration, that we found a store at Bremerton, Washington, had enough rubber boots in that store to fully equip the city of Seattle. All of these rubber boots could not be sold in Bremerton, it was therefore necessary to transfer some of that merchandise out on the front line, where it could be sold in various localities.

Q. By "front line," you mean other stores?

A. The other stores. Inasmuch as this merchandise was being transferred out of that federal jurisdiction, into another jurisdiction, it was necessary that accurate records be kept of such transfers of merchandise. These records were kept, and they were checked in approximately the same fashion that the purchase orders and invoices were checked.

Q. Now, with regard to bank accounts, tell us about the bank accounts?

A. The Receiver maintained a bank account in sixteen local banks, I mean by that he maintained a bank account where each store was located. He also maintained a bank account in the city of Oakland. The store managers were authorized to carry only a fund sufficient in their cash till to provide change for day-to-day operations. They were instructed then to remit to the Receiver daily any

(Testimony of Phillip A. Hershey.)

balance remaining over and above that agreed amount. These bank accounts, the seventeen abnk accounts, were reconciled [221] monthly during the course of the receivership. The general bank account in the city of Oakland has been reconciled monthly since the closing of the bank account at the various stores.

During the progress of this receivership, the moneys that came into the hands of the Receiver were kept in a bank at Oakland. This money was drawing interest, and the total amount received up to the filing of the final account was $3,539.86.

Q. You spoke of reconciling bank accounts. What do you mean by that?

A. I mean that a bank account might show, that is, a bank account might show an amount as being to the credit of an individual or firm, but that is not the true balance of that account, as far as the books of the individual or the firm is concerned, because there might be unpaid items against that balance, therefore it is necessary to check, and see what items have been issued remaining unpaid, at the date of the statement, and deduct those items from the balance appearing upon the statement as issued by the bank; to also add to that balance any amounts which were reported to have been in transit, at a future date to check back and see that those items reported in transit were properly received.

There were a few local operating expenses, such as water, heat, light, etc., which were paid by the local store manager. The rest of the payments

(Testimony of Phillip A. Hershey.)

(expenses) were made by check, in the majority of cases.

There were 687 creditors, whose accounts appeared upon the ledger; so that when we came to make payment of dividends to the creditors, the dividend checks were drawn to each of these various creditors, respectively.

We received daily reports of the sales that were made in these various stores during this period. These reports contained data as to the actual sales, the expenses that were paid in cash and the amount of the cash remitted. A report was received daily that carried the merchandise invoices that had been received, or the merchandise [222] transfers that had been received. Attached to it were the petty cash vouchers supporting the petty cash expenditures.

Those reports were consolidated daily for the sixteen stores. First the report was made up as to each store, and then the total for all of the stores, so that we might know what the total sales to date were for each store, and also for the total number of stores. Our cash reports and consolidated trial balances, together with our consolidated operating statement, were made monthly. I also computed the percentage on the individual operating statements. I submitted all of those matters to Mr. Lieurance; and a copy of the monthly statement was sent direct from my office to receiver Gotthold in New York City, every month. After each day's proceedings were thus recorded, and

(Testimony of Phillip A. Hershey.)

records made by me, those records were turned over to Mr. Lieurance daily.

There were insurance policies upon these various documents (*sic* should be "stocks of merchandise") in these different stores. The policies had to be increased or decreased as the merchandise was sold out of the store and we received credit for that decrease, and, naturally, were charged with the increase in the premium; but the insurance was maintained at a proper level. In some cases at the inception of the receivership, it was too high, and in other cases there was absolutely no insurance on the stock of merchandise in the store. These matters became a part of my service in recording and checking them.

I remember about the time when it was determined to sell the stores out as a whole. I was called into daily conference with Receiver Lieurance and Attorney Eliassen; I also had conferences with prospective purchasers.

Q. What was the nature of their investigation, or was there any such investigation by them that necessitated your reviewing your books of account, so that you informed them of the status?

A. They wanted to know the approximate inventory at that time, they [223] wanted to know the fixed and variable expense for each of the stores, they wanted to know certain information about how much was paid each man in the store, and whether these men would be available to a certain extent, but that part was more Receiver Lieurance's

domain than mine. They questioned me mainly about the figures of sales and expenses.

I was able to inform them quite fully, as to the status of the stock in the stores, the amount of stock in the stores from time to time. When these stores were sold, they were sold as of a certain date. In other words, the stores were continued in operation by the Receiver for a period of time after bids were actually received for them; it was the understanding with the prospective purchaser, that the stores would be kept alive.

After the bids were received and returned to court, it was necessary for us still to continue with the same degree of accuracy, complete records of the stores and the information in relation to them, because we had to make complete detailed settlement statements to the purchasers of the stores, and they were very exacting in their demands as far as statements were concerned.

I think there were approximately six or seven purchasers; I would have to refresh my memory by looking up the settlement sheets. When we came to make the transfers, services were required of me with regard to adjustment of insurance and taxes, and the prorating of those things with the purchasers. Those matters were calculated up to the date of the approval of the sale of the stores by the confirmation of the sale of the stores by the Court. So far as I know, the stores were actually delivered into the hands of the purchasers quite early after the orders of confirmation of the sales

(Testimony of Phillip A. Hershey.)

were made. It was understood that the purchases would be made as of the date of August 31.

I was required to make the adjustment with these purchasers when they came actually to receive delivery of the stores and pay [224] the money. They wanted a full report of all sales, of merchandise transfers out of the store, all merchandise transferred into the store, all purchases of merchandise, all payments, either by petty cash or by check made from or for the account of that store, also a statement of the *pro rata* of the insurance and a *pro rata* of the taxes. It was my understanding that it was understood with the purchasers that the stores would be maintained as going concerns until the actual delivery of them.

There were many claims filed here by creditors. We made a record of those claims as they came in. We did not keep a book in which those claims were shown, but we maintained what is known in accounting as working papers, which take the place of bound volumes.

There was correspondence carried on in regard to these claims. I corresponded with a number of claimants. Duplicate of such correspondence are attached to the claims filed here in this court.

I was called into court, or before the Master, in five, or six, or seven instances, where contested claims were being heard and considered. Those hearings were had in the chambers of Commissioner Nebeker, in Oakland, California, where my office is.

(Testimony of Phillip A. Hershey.)

Some claims were filed in New York, and others were filed here. I went to New York, under the instructions of Receiver Lieurance, and under the orders of the various courts in the western jurisdictions. The Receiver had been endeavoring constantly to secure from his co-Receiver in New York and Attorney Ernst, information which was essential to round out our accounting here, and my conduct as an accountant of this business. I went to New York November 10, 1926.

At the inception of this receivership, the books and records of the Pilcher Co. in New York had not been brought down to date. The books had lapsed with the 28th of February. They kept no books to speak of *that after* date.

When I went to New York, I received there information from [225] accountants connected with the receivership in New York, concerning these books, up to the date of the receivership in this way: I worked with a firm of accountants in New York, in the checking of the items which had been posted into the accounts, possibly the ledger, from February 28 to June 3, the date of the receivership. So that, while in New York, and in conjunction with the accountants there, I examined the books of the Pilcher Company from February until the inception of the receivership. I transmitted that information into my working papers. I was absent on that trip 38 days; there was traveling time in between; I do not recall just what that traveling time was. While I was in New York, I

(Testimony of Phillip A. Hershey.)

worked on this matter daily, excepting holidays and Sundays. I found it necessary to work at night there. I made reports to Receiver Lieurance daily of the information that was being secured in New York; I also prepared some schedules at night.

In New York, I also performed services in connection with an examination into the proof of the claims which had been filed with the Receiver in New York City. In examining those claims, it was necessary for me to look back into the books of the Pilcher Company as they existed in New York; it was necessary to check some of the claims back to the very first entry that had been made upon the ledger of the creditors of the company, check the proof of claims with that account. That took me back to the time that the company first began to purchase.

(Recess was taken at this point until 2 o'clock P. M.; when the hearing was resumed, Mr. Crosby stated in the record that during the noon hour Mr. Hershey, the witness on the stand, had examined the vouchers relative to the four items to which attention was called by Mr. Heney "this morning" when questioning Mr. Lieurance; and the witness testified upon this subject as follows:) I find that the first voucher is dated October 6th, No. 460, in the amount of $158.17; I also find that Mr. Eliassen and Mr. Lieurance left for the northwest [226] on October 9th, three days later. The voucher dated October 26th, No. 539, in the amount of $188.17, bears the notation "Traveling expenses."

(Testimony of Phillip A. Hershey.)

I find that Mr. Lieurance and Mr. Eliassen left Oakland for the northwest on October 25.

(At this point, Mr. Heney directed the attention of the witness to the fact that there was another item, dated October 28, appearing on page 595 of the account, reading "A. F. Lieurance, Traveling Expense $203.60"; the witness then said: "I would have to refer again to the vouchers"; and Mr. Heney then said, "Do not stop now"; and the witness said, "I will make a note of that.")

Referring to the other two items, the witness testified: There is an item dated October 30, voucher 575, in the amount of $275.16, and on this voucher it states, "A. F. Lieurance To Northwest Traveling Expense." That would be railroad fare, payable to the Southern Pacific Company, and the checks were drawn to the Southern Pacific Company.

The item of December 11, voucher No. 625, in the amount of $155.43, the voucher bears the notation, "Travelling Expense of Lieurance and Eliassen, to the Northwest"; and that check was likewise to the Southern Pacific Company. (Mr. Heney then directed attention to another item bearing the same date, December 11, 1926, reading as follows: "A. F. Lieurance, Travelling Expense $200.00"; and it was then explained by the witness that the first item was for railroad transportation, and was paid direct to the Southern Pacific; and it was explained and agreed between counsel that the other items was for expenses in addition to

(Testimony of Phillip A. Hershey.)

the payment to the railroad company for fares, such as the expense of hotel bills, etc.)

At this point, Mr. Crosby as attorney for the plaintiffs, stated that the dates of the orders confirming the sales, respectively, were as follows:

October 25, date of the order made at San Francisco, confirming sale to A. L. May in the sum of $41,000; [227]

October 30, date of the order made at Spokane (Eastern District of Washington) confirming the sale to Harrison in the sum of $13,000, and the sale to Phil A. Ditter in the sum of $16,000, both sales being made at Spokane and confirmed on that date by the same Judge.

November 1, date of order made at Portland (District of Oregon) confirming one sale of a group of stores to the Tannhauser Hat Company for $85,000, also confirming a sale of one store to Liberman & Rosencrantz for $12,000.

November 3, date of order made at Seattle (Western District of Washington) confirming a sale to J. S. Wall for $90,000.

Direct Examination of Witness by Mr. CROSBY (Resumed).

While in New York, I did some work in connection with the figuring or adjustment of some of the claims there. As to some of the claims that had been filed, the books of the company would not show all of the items which were contained in the claim, and it was necessary to make some adjustment between the books and the claims as filed.

(Testimony of Phillip A. Hershey.)

That work I did, in conjunction with the accounting firm in New York.

I also had something to do with the checking of the proofs of claims attached to the claims, both in New York and in Oakland. I compared those claims with the ledger accounts of the company. In some instances, claims were presented for the full purchase price of goods or fixtures, when, as a matter of fact, they were being bought on installment payments. The claim of the Webber Show Case Co. was an instance of that kind. They presented a claim for $33,743.21. That claim covered goods or merchandise that was sold to the company on installment payments. I had something to do with the adjustment of that claim, but that work was done in Oakland at [228] the time that there was a hearing upon the claim of the Weber Show Case Co. before Commissioner Nebeker. That claim was reduced by an amount of $16,871.60. There were other like claims that were reduced, but not any one as large as that; that was the largest reduction.

The witness then identified a document as a "report of claims received and allowed," and testified concerning it in substance as follows: All general claims are referred to in this document; the preferred claims are not included in this schedule. I have no other schedules of claims like this; this is the only schedule of claims that I have. I have other schedules relating to other branches of this business, and which I have prepared as a part of

(Testimony of Phillip A. Hershey.)

my services in this matter. I have copies of them with me.

Mr. CROSBY.—We will offer in evidence, if your Honor please, all of the schedules that the witness has referred to, having to do with his services as an accountant in this matter, and without specifically identifying them, ask leave to permit the witness, when we close the hearing, to assemble them and leave them here on the desk. Is that all right Mr. Heney?

Mr. HENEY.—Yes, that is all right.

Mr. CROSBY.—Likewise his books of account and records.

WITNESS. — (Continuing.) During the long period of time, while I was in New York, I kept in constant communication with Mr. Lieurance as to what I was discovering and as to what I was preparing. It was necessary to correspond at some length with him in reference to what was transpiring; it was also necessary to call him by telephone on some urgent matters.

While I was in New York, I attended the meeting of the New York Creditors' Committee. I did some work in connection with some of the representatives of the New York Credit Men's Clearing Bureau, in connection with this receivership. At this meeting of the New [229] York Creditors' Committee it was suggested that the first dividend be paid as promptly as possible; they wanted the dividend to be as large as could properly be paid at that time, but there was such a discrepancy

(Testimony of Phillip A. Hershey.)

between the records of the accounts payable as kept in New York and the claims filed that we at that time did not know what the total amount of the claims would be. It had been reported to us that approximately $600,000 would be the total liabilities. Upon investigation I found that they were greatly in excess of that amount, by approximately $140,000. Of that amount, a great number of creditors had not filed claims; it was decided that we should make a last request of such creditors to immediately file their claims within the next 24 or 48 hours, and that work we did, working the better part of an evening and night, that is, I say "we," the representatives of the New York Credit Men's Clearing Bureau and myself got out notices so that they would be in the following morning's mail.

As a result of that work, above mentioned, additional claims poured in by messenger and registered letter. I should say that perhaps 50% (in amount) of the claims which had not been filed, were filed within the next few days. After that, I returned to Oakland.

In the preparation of the final schedules, growing out of these claims, I performed the following work: I prepared a final schedule of liabilities of the defendant company as they had been adjusted to the claims filed to date; comparing those two, I found that there were yet about $75,000 worth of creditors or creditors' claims which had not been filed.

Subsequently they filed claims. We corresponded,

(Testimony of Phillip A. Hershey.)

or, rather, I corresponded, under Mr. Lieurance's instructions, with these people, telling them that their names had appeared as creditors upon the books of the defendant company, and that it was the wish of the Receivers that all creditors share at the same time in [230] this first dividend, and would they please file their claim or else send in a waiver of their right.

In connection with the payment of the first dividend, I performed the following services: I computed the amount of the dividend checks, based upon the claims which were allowed, prepared the checks, and after they were prepared checked the total to see that the total amount of the checks agreed with the 40 per cent of the total amount of the claims filed, and delivered the checks to Mr. Lieurance.

I had occasion to go to the stores in the northern jurisdictions. Acting under instructions of Mr. Lieurance, I left Oakland, California, and on September 17, 1926, went to Portland, Oregon, and Bremerton, Washington, for the purpose of checking the cash accounts of these stores, and also for the purpose of visiting the stores at Monroe and Everett, Washington. I arrived in Portland, and arrived at the door of the store prior to the opening of the store, and asked immediately to count the cash. Upon counting it I found that the cash was some $600 short. I questioned the store manager about the shortage, and he said, "I will give you a check for it, that is just an I. O. U. account."

(Testimony of Phillip A. Hershey.)

I said, "I would suggest that you give me a certificate of deposit to the account of the Receiver by three o'clock this afternoon," which he did. I also discovered that he had, previous to the receivership, drawn funds from the Portland store. I made private investigation on my own behalf in Portland and found out that I had already secured all the money he had when I got the $600, so I took the next best chance and got a promissory note for the balance, I believe it was in the neighborhood of $1,600. This money had been taken from the accounts of the Portland store prior to the receivership. I immediately communicated with Mr. Lieurance by wire, and told him the circumstances, and he instructed me then to discharge this manager, and the cashier and clerk who had been working in conjunction with him. That I did. [231] I also suggested the name of the head clerk—each of these stores had not only a manager, but they were fortified to this extent that they had a man who was a head clerk, that is, if the manager was incapable of performing his duties, the head clerk by prearrangement stepped in and ran the store. This man was satisfactory to Mr. Lieurance, I assume, because he instructed me to instruct him in his duties as a store manager, and how to make proper reports. I introduced him at the bank and arranged for his banking facilities, etc. We did not, by the way, replace the two clerks, the cashier and the clerk, that were discharged. We just cut the pay-roll to that extent. I then proceeded to

(Testimony of Phillip A. Hershey.)

Bremerton, Washington, as fast as I could, because news travels fast in a chain store organization, and I found a situation there which in my opinion called for the discharge of two employees from that store. I immediately communicated with Mr. Lieurance that information, and he instructed me to discharge those employees, and I did, and their places were not filled.

I see these accounts that are filed here. I prepared these accounts. They are made up from all of these records that I have brought into existence, to record the transactions of this business from the beginning. The final account is a complete itemization of every transaction of the Receiver, every financial transaction, I should state. When I made up this account, I found it necessary to go back to the beginning of my records and follow them on through, check them up; and I did that.

Q. Now, do you know if accounts were prepared, such as the one as it is on file on his Honor's desk, there, and sent in to all jurisdictions?

A. They were prepared for each jurisdiction, that is, each of the western jurisdictions, and copies filed with the Courts in these jurisdictions.

Q. Do you know if any was sent to the Co-receiver, Mr. Gotthold, in New York, or his attorney?

A. Yes, there was a copy of the account sent to Mr. Gotthold immediately upon completion of the account. [232]

The first dividend was 40%; the second dividend

(Testimony of Phillip A. Hershey.)

was 10%, and was paid on the 13th day of May, 1927, —that is, 10% of the aggregate claims allowed.

Q. Could you give us approximately the number of letters that you have had to write in connection with this business?

A. Well, by count, over 200 letters. Not having access to the claims filed, I could not give you the exact number, but I do know there were over 200 letters written by me in reference to the receivership; in my own opinion many times that number.

Q. Now, approximately how many days were you taken away from your office and out of the State of California, in connection with this business?

A. For approximately 48 days.

Sometimes Mr. Lieurance, himself, was out of the city of Oakland in connection with the business. During these times, from the Oakland end of this business, I kept Mr. Lieurance informed daily, in complete detail, as to all transactions that transpired, when he was up north and away from the city on business.

Q. In the performance of your duties in the conduct of your branch of these affairs, state whether or not you were in consultation or called upon to consult with Mr. Eliassen, the attorney, in addition to Mr. Lieurance, the Receiver?

A. I can state from the records that there was not a day passed for the first five months of the receivership but what I was in daily contact with Mr. Eliassen and Mr. Lieurance, when they were in Oakland. Of course, I was in communication with

(Testimony of Phillip A. Hershey.)

Mr. Lieurance when he was out of Oakland, but that was by letter and wire.

Q. You say not a day passed? Do you mean Sundays and holidays?

A. I mean that there were many Sundays and many holidays.

Q. That you worked? A. That I worked.

Q. On this business? A. On this receivership.

Q. How about hours after the usual laboring hours of the day; did you work on some of those occasions at night, at all? [233]

A. I worked, I might state, so many nights that I almost had some family difficulty, having been married only the year before.

Q. It got so you had to report as to where you were? A. I had to report.

Q. You reported truthfully?

A. I reported truthfully.

Q. Would you say that you, upon many occasions, worked with these gentlemen in connection with this business in their offices, or your office, at night?

A. On many nights, not only to the office, but I was called to Mr. Lieurance's home evenings to discuss these matters and report upon the affairs of the receivership.

Q. Mr. Hershey, state whether or not you were required to hold yourself in readiness at all times to respond to this particular business.

A. I was to the extent that I had to subordinate other work in my own office.

Q. Did you subordinate other work?

(Testimony of Phillip A. Hershey.)

A. I certainly did.

Q. Mr. Hershey, in your judgment what is a reasonable compensation for these services that you have performed here, as you have outlined them?

A. I believe that not less than $10,000 is reasonable compensation for the services rendered.

Cross-examination, by Mr. HENEY.

In describing this work that I did, when I used the pronoun "I," and stated that "I did this and did that," I do not mean to be understood as saying that all of this detail work was done by myself, personally; I had assistance.

There was a bookkeeper employed by the Receiver, from the middle of June, I should say, until the end of December. This bookkeeper was a woman, by the name of Harmon, and her salary was $27.50 a week. She performed just the general duty of a bookkeeper and office assistant, under my constant direction. I would class her as a competent bookkeeper.

Q. To what extent did she check the reports that were made of cash, receipts from sales of each of these stores?

A. I should [234] not say that she checked these reports; I check the reports myself. These reports came to me to be checked.

Q. Every day? A. Every day.

I do not believe that she assisted in any of this work of computing the amount of percentage on the dividends.

(Testimony of Phillip A. Hershey.)

At the time we were taking the inventory in June, there were 12 or 14 people assisting in that work. They were employed by the Receiver. I both supervised and directed their work. They were women. They were in the employ of the Receiver only for the period of time that the inventory was being computed. These women that were employed worked these machines.

Q. When you first commenced there did you have any assistants other than Miss Harmon, when you first commenced on the books, or did you have them?

A. No; we did not know what this receivership was going to turn into, and the work piled up so fast that the mass of detail had to be attended to, and it was then that she was brought in.

The Receiver did not employ anyone besides Miss Harmon, at any time, to assist me. I had others in my employ, assisting me in some of this work.

Q. How many persons that were in your employ, and to what extent did you have assistance?

A. Well, there was a mass of work that had to be done, such as work on these working papers that I speak of, these cross-additions, etc., I had two people working on that at times in addition to myself.

Q. To what extent?

A. I do not quite understand what you mean, to what extent they were employed.

Q. A number of days, or a number of weeks, or a number of months, or how much time?

A. A number of months.

(Testimony of Phillip A. Hershey.)

I do not mean that they put in their entire time on it. I had other work in the office on which they were engaged at the same time that they were doing this other work. Occasionally they would [235] do some of the computations.

Q. It might be half an hour's work a day and sometimes an hour? A. And sometimes a day.

Q. And sometimes a day? A. Yes.

Q. Not very often? A. Sometimes weeks.

Q. Not so that you could give us a statement of how many days they put in?

A. I do not believe that I could do that, no.

I had other work in the office. I gave attention to the other work in the office during this period.

Q. How did the total volume of work in your office compare with the work of this particular business?

A. Are you asking me to answer in terms of dollars and cents, or in time of employment?

Q. In labor.

A. Well, I cannot state definitely how many clients I have; I will be very frank with you, I could not tell you off-hand. I have quite a number of clients, I will say that, but their affairs were attended to. A great many of my clients, their affairs had to be postponed until this matter was over; on rendering income tax returns, it was necessary for me to require extensions of time for filing clients' returns; but as to just how much in percentage this work took in comparison with other work, I could not state.

(Testimony of Phillip A. Hershey.)

I have other accountants employed in my office, only from time to time, as the occasion arises. Accountants are high-priced men to employ, and we do not care to have them around when they are not working. We pay them anywhere from $10 to $15 and $20 a day.

It is not true that my regular charge to clients for an accountant is $25 a day. It varies with the intelligence of the men and the character of the work that they are doing, in making the charge to the client.

Q. If I came in there and stated I wanted to have a set of books audited by an accountant, without giving you any other information, wouldn't you tell me it would be $25 a day? [236]

A. No more than if I would come into your office and ask you to try a law case for me, and not give you any details of the case, and you say $50 a day.

Q. You might come into the office and I tell you $50, or $75, or $100 a day.

A. I used to do that when I first started to practice, and I got burned so many times on my fees that I decided it was better to compute the fee upon the basis of the work done, and the character of the work done, and the time required.

Q. Isn't it a general standard of practice among accountants such as Price, Waterhouse & Co., to charge $25 a day for an accountant?

A. For one type of accountant; for some they charge $100, $250, $500 a day, depending upon the type and character of the work they are doing.

(Testimony of Phillip A. Hershey.)

Q. Is Mr. Price living? I thought possibly he might be the only $500 a day man in the world.

A. We have a $500 a day man in San Francisco, John Forbes, of Haskins & Sells. He has been known to charge $500 a day.

Q. He is a partner in that firm?

A. He is a resident partner of Haskins & Sells.

I could not tell you what they charge for accountants with five years' experience only, because I don't know about their business. I have been a public accountant for five years. Prior to that I was in the University of Illinois.

Q. You had no bookkeeping experience prior to becoming a public accountant: Is that correct?

A. Bookkeeping experience is not necessary to the practice of accounting, and I did not have any.

Q. That was not my question; I am not asking you to testify as an expert on that subject, I am asking you a question.

A. I did have experience in keeping books, yes.

Q. How much experience and what experience did you have?

A. Well, I kept a set of books for my mother about a year when I was attending the University of Illinois, and the course given at [237] the University of Illinois, as a part of the curriculum as keeping such books, and in that training I had additional bookkeeping experience.

Q. You cannot very well learn bookkeeping without trying to put something down in a book.

(Testimony of Phillip A. Hershey.)

A. We did that very thing, we were given entries and certain transactions, and we put those transactions into these books.

Q. In other words, you studied bookkeeping at the University of Illinois?

A. I studied accounting at the University of Illinois.

Q. That includes bookkeeping?

A. That includes bookkeeping.

Q. What is the distinction between bookkeeping and accounting?

A. A bookkeeper is, I suppose, one who can make a number of entries in a set of books after the way has been paved for him to make those entries.

I should say that I was engaged probably from five to ten days in formulating a set of books to be used by the Receiver at his Oakland office.

Q. Now, after those ten days of work, what work was done by you that a bookkeeper would not do, or would not be able to do, a competent bookkeeper?

A. I could not answer that question, because I don't know what a competent bookkeeper could have done under those circumstances.

Q. You had a competent bookkeeper there, didn't you? A. I judge that we did.

Q. Couldn't she have made those entries without any assistance from you?

A. That is merely a supposition. I acted under instructions of Mr. Lieurance, the Receiver, and my services were rendered under his instructions.

(Testimony of Phillip A. Hershey.)

Q. He did not instruct you as to the manner or method of keeping the accounts, did he?

A. No, he did not.

Q. Nor making the entries?

A. He told me what results [238] he wanted from these books.

Q. Did it require any peculiar skill as an accountant to check up the cash accounts that came in from these stores? A. I should say that it did.

Q. Something different from what an ordinary competent bookkeeper would have to know?

A. Yes.

Q. What was it?

A. The administration of the chain's business, there are many problems and many questions arising that do not arise in the conduct of an individual business, because there are inter-company or inter-store transactions that are extremely difficult to handle.

Q. For instance, one store gets some merchandise from another store? A. Yes.

Q. That is very difficult to handle in bookkeeping, is it? A. I should say that it was.

Q. What is there difficult about it?

A. The inter-store transfers of merchandise were not paid for in cash. There was a branch office account on the other side with each of these stores; that was a summarizing a totalling account, and these transactions were cleared through that account, all of the transactions between the stores, and

(Testimony of Phillip A. Hershey.)

it required skill to do that, to see that that was done properly and accurately.

Q. It was not any more difficult than clearing checks for banks?

A. I have never cleared for banks, so I could not answer that question.

Q. As an expert accountant, do you mean to say you don't know anything about how that is done?

A. I do not know how it is done.

Q. The other isn't any more difficult, is it, that you were doing, on these transfers of the chain stores?

A. I should say that they probably are equally difficult.

Q. What proportion of your time would you say that you gave to this business exclusively during the period of time that you [239] were engaged in it?

A. I believe you asked me that question before, and I told you that I could not state what proportion of my time I gave. I was constantly available for the Receiver and his attorney from early morning until late at night.

Q. Your offices were right almost adjoining, weren't they, in the same building?

A. Correct.

Q. And you did not hold yourself in office just to hear from them?

A. No; they held me in their office so that they could hear from me.

Q. You do not mean to say that you remained

(Testimony of Phillip A. Hershey.)

in their office during most of the time during the day?

A. I mean to say that the conduct of this business was of such nature, and there were so many transactions, that it was necessary for me to be in constant and daily touch with Attorney Eliassen and Receiver Lieurance.

Q. Yes, during the day he might want to ask you some questions, and either walk into your office or ask you to come into his office and ask it of you: Is that what you mean?

A. No, I mean I was called into conference in their office and remained hours and hours at times.

Q. That did not happen every day, did it?

A. Practically every day, Mr. Heney.

Q. And hours at a time practically every day?

A. Yes.

Q. How many hours at a time?

A. Well, three, two, four, one—we have been in conferences that lasted all day, of course, going out for lunch, and at times going out for dinner, and then returning afterwards.

Q. Did you get the impression around Mr. Eliassen's office that he was not doing any other business except this?

A. No, I did not get the impression that he was not. I got the impression, though, that this business was taking a tremendous amount of his time.

Q. You could not say what proportion of his time, either, could you?

A. I did not keep Mr. Eliassen's books. [240]

(Testimony of Phillip A. Hershey.)

Q. I concede that there was a large amount of work done, Mr. Hershey, I have not any doubt about that, but I am trying to get at the amount of your time which was actually given to it. When you talk about one, two, three, and four hours a day, I would like to know how many days, about, that occurred during this period of time.

A. Well, in the period covered I put in, I should say, some 2,600 hours.

Q. Is that an estimate, or a guess, or what?

A. No, it is taken from my time-books.

Q. Did you have any fixed charge per hour for work?

A. I have no fixed charge per hour for work; it varies from $4 an hour to cases in which I have appeared before courts and the like of $50 an hour.

Q. You mean appear as an expert witness?

A. Yes.

Q. Leave that out, because that is not involved in this case.

A. Well, from $4 to $10 an hour.

I cannot give you any approximate figure as to what, if anything, was made by operating these stores; I have not those figures available.

Q. Can you give us the total operating expense of each store, or does your account show that separately, do you remember?

A. The account does not show that part separately. I was informed that the accounts that were filed in legal form were different from accounts filed, from an accountant's standpoint, but that information

(Testimony of Phillip A. Hershey.)

could be obtained from the books, and the month to month information will appear in the schedule that I will supply this Court, as you already know.

Q. That is a thing you are going to supply?

A. Yes, I will.

Prior to my employment by the Receiver, I did work for Mr. Lieurance. The work that I did was in reference to his income tax return. I did not do any other work for him.

Referring to the example I gave of some transfers of rubber [241] boots: There were quite a number of transfers made between these stores. Mr. Lieurance went and visited the stores, I believe it was after the inventory had been taken, and endeavored to find out what one fellow needed at one store, or perhaps another fellow needed at another store, so that the Receivers would not be forced to go out into the market and buy these goods. As to the number, I could not tell you, although there were a great number of such transfers.

The 2,600 hours I referred to, I took from a memorandum that I kept. I keep a record in which I enter my personal time, and the jobs that I work on. I did not keep an exact record of this particular job, because this was occupying so much of my time; and, and as so many attorneys and so many accountants have done, I did not put down the exact number of hours and minutes; but I did take the number of hours used on this work.

Q. I notice you bring the attorneys into that. Are you basing that on Mr. Eliassen's books?

(Testimony of Phillip A. Hershey.)

A. No, I am not basing that on his books. That figure is entirely mine.

Redirect Examination, by Mr. CROSBY.

Q. Mr. Hershey, as I questioned you here on the stand, you have had a memorandum before you. The testimony that you have given is approximately all stated in that memorandum, is it?

A. Yes, it is.

A general statement by Phillip A. Hershey, purporting to state in detail the services rendered by Mr. Hershey (being the "memorandum" above referred to in Mr. Hershey's testimony) was offered by the plaintiffs and received in evidence, without objection, with the same effect as oral testimony, and subject to the right of cross-examination concerning the matters contained therein, and with the understanding that this statement by Mr. Hershey had been submitted to experts called or to be called in reference to his fee; and such statement was identified as Receiver's Exhibit 4. (See Transcript, pp. 50, 64, 86, 87.) [242]

TESTIMONY OF ANDREW FAIRCHILD SHERMAN, FOR PLAINTIFFS.

ANDREW FAIRCHILD SHERMAN, called and sworn as a witness for the plaintiffs, testified, in substance as follows:

Direct Examination by Mr. CROSBY.

I live in Oakland. My business is that of a cer-

(Testimony of Andrew Fairchild Sherman.)

tified public accountant, which I have been for about four and one-half years. I have been engaged in public accounting since 1918. My work leading up to public accounting, began as a bookkeeper with J. K. Armsby & Co. in 1909.

I am a director of the California State Society of Certified Public Accountants. I am a member of the American Society of Certified Public Accountants.

I know Mr. Hershey, the gentleman who preceded me on the stand. I was here during the morning, while he was on the stand, and I was here a part of the afternoon while he was on the stand.

I have seen and read a typewritten memorandum that Mr. Hershey had this morning containing the general statement of the services that he has rendered in this matter.

Q. I will ask you what your judgment of the value of the services so rendered by him as described by him in your presence upon the witness-stand, and as indicated by his statement that you have read?

A. I consider a reasonable fee for those services to have been $15,000.

Cross-examination by Mr. HENEY.

Q. What is there about these services that distinguishes them as accounting services as distinguished from bookkeeping services?

A. It is a question of the judgment required in

(Testimony of Andrew Fairchild Sherman.)

the handling of the detail and the interpretation of the detail.

Q. The transactions were filed by somebody else, and the bookkeeper exhibits those transactions: Is that right? A. That is right.

Q. The transactions come into the office, mostly in written form, and would be exhibited in the books. What is there about exhibiting them in the books that is distinctly an accountant's work as [243] contradistinguished from a bookkeeper's work?

A. The entering of these transactions on the books, themselves, is primarily a bookkeeper's function, the actual entering of these transactions; the matter of keeping track to see that the transactions are properly entered, etc., where there is such a large mass of detail, requires greater concentration and more intelligent application or ability than the average bookkeeper has, and, therefore, that is why we find, where we have detail work of that kind, that it is supervised by an accountant.

Q. Practically all lines of business employ bookkeepers, do they not? A. Yes.

Q. Then an accountant comes in maybe once a month, or once every three months, and audits it?

A. That is right.

Q. Then the bookkeeper exercises this discretion and judgment that you are talking about, as to how to make the entries, doesn't he? A. Oh, yes.

Q. So that if Mr. Lieurance were appointed Receiver, he could have Mr. Hershey come in once a

(Testimony of Andrew Fairchild Sherman.)

month, or once in three months, and do the accounting on that, couldn't he, if the books had been formulated, as to the plan of keeping them?

A. If Mr. Lieurance gave the necessary supervision to the bookkeeper right along; you see, the average bookkeeper cannot be left alone to go ahead with the detail work unless the transactions are relatively simple and are practically the same day after day. Accountants come in and take care of the the numerous irregular transactions which arise day by day. Now, the frequency with which these irregular transactions arise governs the rapidity with which we appear in the office. In other words, it might be necessary, with certain accounts, to come in as often as once a month, because the irregular transactions cannot be handled by the bookkeeper employed. In other cases it might be for longer periods.

Q. A transfer from one store to another might be classified as an [244] irregular transaction, I mean on your definition? A. It might, yes.

Q. After the first one had been made, the second one would be easy enough, would it not—after being instructed how to make the first one, the second one would follow the same lines, would it not?

A. The actual work or method of entering would be the same. The whole thing, in all of this particular work, as I see it, would be the great opportunity for mixing up the accounts between the stores, and that is why the average bookkeeper does not maintain the accounts in proper order,

(Testimony of Andrew Fairchild Sherman.)

and that is where it needs constant supervision of a more intelligent individual than the average bookkeeper. In large stores they have their so-called controller, where they have branch houses, and the like, whose business it is to keep in constant touch with the bookkeepers to see that they are not mixing things up, and to study the accounts from the standpoint of the relationship between the branch stores.

Q. And, in turn, if it is a very large concern, they have traveling auditors go around? A. Yes.

Q. And in getting these traveling auditors, as a rule, they are men who have graduated from bookkeeping and are getting about the same salary as the traveling auditor does?

A. The traveling auditors that I know of get more than a bookkeeper.

Q. Very little more?

A. No, I would not say very little.

Q. About how much per month?

A. Well, a traveling auditor for one concern that I know of gets $400 a month, and all bookkeepers get is about $125, an average of $125.

Q. That traveling auditor who gets $400 a month, he is not one of half a dozen for the same concern —the traveling auditor who gets $400 a month?

A. No.

Q. Is that $400 a month man the general auditor?

A. No, he is the fellow that goes out to the plants. The point that I want to bring out is that the man in that case who goes out as an auditor has to be

(Testimony of Andrew Fairchild Sherman.)

a man who knows a little more than a bookkeeper, [245] who is engaged in routine work day after day, in order to identify something that is going wrong at a plant, who is absolutely reliable.

Q. That is their function, to discover where there is anything wrong going on at these plants and report that?

A. I believe that is usually the function of checking up the accounts.

Q. This one who gets the $400, that you have in mind, is a high-class bookkeeper, a good accountant?

A. A fair accountant, yes. I do not specify that as the average salary of the traveling auditor. For instance, the auditor of the American Telephone & Telegraph Company, that comes out to audit the accounts of the subsidiary concerns, gets a salary approximately ten times as much as that, *then* or twelve times that.

Q. The traveling auditors for Murphy, the automobile man, do not get as much as $400 a month, do they? A. I do not know anything about them.

Q. Nearly all of these automobile companies have traveling auditors, where they have branch houses around in the state, do they not?

A. I cannot say. I know of one concern in the state that does not have a traveling auditor, but has the services of a firm of certified public accountants to make a regular audit each month at the branches.

TESTIMONY OF WILLIS LILLY, FOR PLAINTIFFS.

WILLIS LILLY, called and sworn as a witness for plaintiffs, testified, in substance, as follows:

Direct Examination by Mr. CROSBY.

My home is in Berkeley; my business is in San Francisco. I am with the firm of McLaren, Goode & Co., certified public accountants. I have been engaged in that business, off and on, since July 1, 1916, at which time I left the University of California, where I was an instructor, with the exception of 18 months spent in France, [246] approximately the same period as comptroller of George Burn Co., I think eleven months at the University of Washington as assistant professor. I am a member of the California State Society of Certified Public Accountants; and I am a member of the American Institute of Accountants, which is a separate and distinct organization from the American Society of Certified Public Accountants.

I have known Mr. Hershey since last summer when he came into my office with a question of his charge on this account; prior to that time I had not known of his existence. I was here this morning while he was testifying; and I was here during part of his testimony this afternon. I noted that he was testifying with a memorandum before him. I have read that memorandum, casually.

Q. I will ask you to state what, in your judgment,

(Testimony of Willis Lilly.)

would be the reasonable value of the services rendered by Mr. Hershey in this matter, as described by him from the witness-stand, and in his statement which he has given you to read?

A. I can only answer that question on the basis of what my own organization would have charged as a minimum, and without stating the maximum. After referring to Mr. Hershey's work, after having gone over this report, his monthly reports to the receiver—and this happened last summer—I asked him to give me the total number of hours reflected by his time-sheets as having been devoted to the engagement; he gave me something like 2624 hours, which, on the basis of a seven-hour day, that is, our basis, a seven-hour day, the type of work that was done there would require as the immediate supervisor on the job a man for whose services we charge not less, and this is based on experience, than $30 a day. Whatever junior assistance would have been necessary in order to get these records in shape, for instance in the calculation of that inventory, what supervision would have been necessary is another matter. I could not off-hand tell you what that is on the basis of $30 a day. I would say, off-hand, that the minimum fee, had McLaren, Goode & Co. done that work, would have [247] been not less that $12,000. The maximum I will not state, because I could not determine how much of mine or any of my partners' time would

(Testimony of Phillip A. Hershey.)

have been required in the administration of the Receivership.

(No cross-examination.)

TESTIMONY OF PHILLIP A. HERSHEY, FOR PLAINTIFFS (RECALLED—CROSS-EXAMINATION.)

PHILLIP A. HERSHEY, recalled for further cross-examination by Mr. HENEY.

The interest rate paid on these bank deposits was fixed as the rate fixed by the Clearing House Association, which is 2% on the average monthly balances subject to check; the accounts are subject to check. We endeavored, I may say, to get more, but they presented us with the clearing-house rule, I argued a little, and so did the Receiver, but they could not break their clearing-house rule.

Those stores were not permitted to sell on credit; the business was all cash transactions.

TESTIMONY OF EDWARD R. ELIASSEN, FOR PLAINTIFFS.

EDWARD R. ELIASSEN, called and sworn as a witness for the plaintiffs, testified, in substance, as follows:

Direct Examination by Mr. CROSBY.

I live in Piedmont, California. I am an attorney at law; have been engaged in that business since August, 1899. I am admitted to practice in all of

(Testimony of Edward R. Eliassen.)

the courts of the State of California, all of the United States courts within the State of California, and the United States Supreme Court.

I am the attorney for the Receiver in this matter now pending before this Court. There were two Receivers, Mr. Gotthold of New York, and Mr. Lieurance of Oakland. There are four western [248] (federal) jurisdictions, which have been referred to here, and in which the business of this company was being conducted.

I have conducted the business of those receiverships, as their attorney, in all of these four western jurisdictions. I undertook the attorneyship for these Receivers in the early part of June, 1926.

As I have proceeded with this work, I have kept a record in my offices of my services from time. I have my correspondence, or copies of it, that has come into existence in my business connected with this receivership. I have all of that here, in the courtroom.

(It was then stated in the record, that the documents just mentioned by the witness were available for examination by the attorneys for the objecting creditors, if they so desired; and with that statement and understanding the documents were not offered in evidence.)

I have here a record of my services.

Q. I hand you now this document, beginning with page A and closing with page 133, and will ask you to state if that constitutes a correct statement of your services in this matter, from the time that you

(Testimony of Edward R. Eliassen.)

began as attorney for these Receivers, until the present time?

A. It is a correct statement, but it is not a full statement. It does not contain any items of time spent or labor involved since August 30, for one thing.

Q. Have you a page here upon which reference is made to that service since August 30?

A. No, I have not, Mr. Crosby, except that I state in the beginning, on page F, that it became necessary for me to go to New York City for the purpose of attending the taking of depositions of Walter E. Ernst, William Fraser, and Arthur F. Gotthold. This trip took me away from my office twelve more days. In this estate I have therefore spent 76 days away from my office and outside of the ctiy of [249] Oakland. I might add that I necessarily employed local counsel in the three northern jurisdictions and that I have incurred an obligation to pay them the reasonable value of their services, which we have agreed is the aggregate sum of $2,650.

Q. That page that you have just lastly read from, beginning with the words, "William Fraser," and ending with the figures "2650," you have this day inserted in that statement. Is that correct?

A. That is correct.

Q. Now, Mr. Eliassen, this statement here shows a full and complete statement—or you say it is not quite complete?

A. It is true and correct, but it is not quite com-

(Testimony of Edward R. Eliassen.)

plete. There are a number of letters received lately, and a number of consultations with Mr. Lieurance, but I am willing to submit it on that.

Thereupon, the statement identified by the witness, and verified by him as "true and correct," was offered in evidence, with the understanding that it would be used as the basis of questions propounded to experts, as a representation of the services that had been rendered; counsel for the objecting creditors consented that the testimony of the Witness Eliassen should be introduced in this written form, subject to right of cross-examination; thereupon the document was received in evidence and identified as Receiver's Exhibit No. 2.

Q. Mr. Eliassen, what do you feel would be a minimum reasonable allowance of the services you have performed in this matter? A. $30,000.

Cross-examination by Mr. HENEY.

I mean a total of $30,000; I have received $15,000 on account; and I am asking for $15,000 more.

(Further cross-examination was postponed to enable counsel to examine the written statement made by the witness and received in evidence as above stated.) [250]

TESTIMONY OF JOHN L. McNAB, FOR PLAINTIFFS.

JOHN L. McNAB, called and sworn as a witness for the plaintiffs, testified, in substance, as follows:

Direct Examination by Mr. CROSBY.

I live at Palo Alto. I am an attorney at law; am admitted to practice in all of the courts of the State of California, all of the Federal Courts in the State of California, and the United States Supreme Court.

I know Edward R. Eliassen, professionally, and as a courtroom acquaintance; that is, we have never been intimate, but I know Mr. Eliassen very well.

A copy of the statement, identified in this hearing as Receiver's Exhibit 2, and which purports to set forth in detail the services rendered by Edward R. Eliassen in this receivership has been submitted to me, and I have read it all.

Basing my opinion upon what is set forth in that statement as to the services rendered by Mr. Eliassen in this proceeding and as to the nature of the proceeding, and with the assumption that all local counsel are to be taken care of out of any compensation allowed to Mr. Eliassen, in the sum of $2,650; after studying this document, I have arrived at the conclusion that Mr. Eliassen should be entitled to a minimum compensation of $36,000.

(No cross-examination.)

TESTIMONY OF CHARLES H. SOOEY, FOR PLAINTIFFS.

CHARLES H. SOOEY, called and sworn as a witness by the plaintiffs, testified, in substance, as follows:

Direct Examination by Mr. CROSBY.

I live at San Francisco; my business is that of an attorney at law; have practiced as such for one month longer than twenty-five years; am admitted to practice in all of the courts of the State of California, and the United States courts in the State of [251] California, and the United States Supreme Court.

I know Mr. Eliassen; I have known him for twenty-seven years. I have known him in connection with the law business; at one time, before the fire, we were office associates in the Chronicle Bldg.; I have known Mr. Eliassen that long.

Receiver's Exhibit No. 2 in this proceeding has been submitted to me; Mr. Eliassen gave it to me. There has also been called to my attention to-day, in addition to the statement as submitted to me originally, an additional page which refers to the amount of money that the attorney in this matter is called upon to pay local counsel, who appeared for him in some of the other jurisdictions, amounting to $2,650.

In my opinion, a reasonable compensation or fee to be awarded to Mr. Eliassen for the services ren-

(Testimony of Charles H. Sooey.)

dered as shown by the statement before me, and which I have examined, would be the sum of $42,-650; that is assuming that Mr. Eliassen pays the $2,650 to local counsel.

Cross-examination by Mr. HENEY.

I arrived at that figure (outside of the $2,650) as follows: I went over this document which was presented to me—I am sorry to say I have read it three times—first a month or so ago, then twice recently. I have taken into consideration the fact that this business was in four jurisdictions, that there has been a very definite distinct accomplishment by the attorney, not only in the matter of the court work and in the preparation of papers, but in matters accomplished for the creditors by negotiations and compromises, which appeals to me very strongly. Then I took into consideration 76 days which he was away from his office.

I have been known to charge $250 a day, I have been known to charge $150 a day, and I have gone for much less.

These 76 days were out of the state. I have taken that into consideration, and I have taken into consideration the fees which would be allowed, possibly allowed by the Superior Court in the administration [252] of an estate and the sale of property such as this by an administrator or an executor; I have taken into consideration the fees allowed attorneys for Receivers in bankruptcy matters. I have called upon the Referee in Bankruptcy

(Testimony of Charles H. Sooey.)

and laid the matter before him and checked up my opinion as to the right amount of fees to be allowed to Mr. Eliassen, had a long conference with him this morning, had this document with me, and went over it; he did not read all of it; he asked me about the accomplishment for the benefit of the creditors, what was done, and he gave me his views on what the fee should be.

The Referee in Bankruptcy I refer to is Judge Kreft. He told me what the federal statute is on the subject of Receivers; and I was very much surprised to learn that where the business is conducted that double the amount may be allowed by the Court; I did not know that. I think he figured on the figures which I gave him that the Receiver's fees would amount to some $7,000 or $7,100, something of that sort. I have not the figures now before me, but he said where the business was conducted, as it was here, that the Court was permitted to allow double that amount to the Receiver. That is as I understood him.

I think he said about $15,000; I am not sure as to that. I had the document with me showing the size of the estate. I think the total assets run $660,000 or $750,000, I have forgotten which; I would have to refer to it. The claims aggregate $749,000, and the assets about $600,000.

Q. Did he tell you they usually did not allow it on the turnover, it was only on the balance?

A. No, we did not go into that; he said that where the business was conducted, that the Court might

(Testimony of Charles H. Sooey.)

allow double the fees. He did not go into that detail, I mean he did not discuss that part of it. I know he figured out about $15,000 for the Receiver's fees.

The practice among attorneys in this state varies, as to [253] their charge *per diem,* where the case may take quite a length of time to try. I believe that when attorneys name a *per diem* charge before Judge Rose, of Los Angeles, they name it much higher than they do before other Judges thinking it will take much less time to try it. I think that they would name a higher *per diem* going before certain Judges, because certain Judges would try it in a very short time, and others would take a longer time to try it.

I do not know what the *per diem* charge is, when the case looks like one that would take several months or six months to try; it depends upon the attorney; I should say anywhere from $150 a day to $500 a day. I think the minimum is $150, for a first class attorney.

Q. Is it not quite customary to make a *per diem* charge of $100 a day for trial work, for a first-class attorney?

A. I know that Joe Campbell took a case of that kind in the Merced Irrigation District against Jim Peck, I think it ran several months, that was several years ago, but he had a contract of $100 a day.

On an estate of $475,000, assuming that the estate under discussion was $475,000, and assuming that it was pending in four jurisdictions just like

(Testimony of Charles H. Sooey.)

the present case, and that the cash actually realized was $475,000, I would make the fee $40,000.

Q. Do you know what it would be in a probate matter? A. I have not figured it up.

Q. It figures $5,580.

A. 7 per cent of the first thousand, and then I presume there would be some extra compensation allowed by the Court in the sale of the property, which I think is 5 per cent in this jurisdiction.

Q. 5 per cent of what?

A. 5 per cent of the sale price.

Q. To the attorney?

A. Yes, I think the probate courts allow a fee of that kind for the sale of property.

Q. I understand the last legislature, or the one before, changed the law so that the sky was the limit in the matter of allowances by the [254] Courts, but it used to be only one-half more than the fee allowed the administrator.

A. I have not had experience, Mr. Heney, and I do not know definitely, but I did make an inquiry from a so-called probate lawyer this morning, and he told me that the Court would allow 5 per cent on the sale price.

Q. I do not think he had Judge Coffey in mind.

A. He did not.

TESTIMONY OF C. M. BRADLEY, FOR PLAINTIFFS.

C. M. BRADLEY, called and sworn as a witness for the plaintiffs, testified, in substance, as follows:

Direct Examination by Mr. CROSBY.

I live in San Francisco; am an attorney at law; have been an attorney at law 24 years; am admitted to practice in all of the courts of the state of California, of the United States courts in the state of California and elsewhere, and the United States Supreme Court.

I do not know Mr. Eliassen.

I have read the statement, identified as Receiver's Exhibit No. 2 in this proceeding, which was submitted to me. I have also examined the additional statement to the effect that Mr. Eliassen necessarily employed local counsel in the three northern jurisdictions, and incurred an obligation to pay them the reasonable value of their services in the aggregate sum of $2,650.

Q. What, in your opinion, would be a reasonable fee to be awarded to Mr. Eliassen, the attorney mentioned in that statement, for the Receivers in this case?

A. Well, I should say from $25,000 to $30,000. Before I had this memorandum here, I had in mind that that statement showed the employment of local counsel, and I was not advised as to whether or not this estate was to pay that, or whether Mr. Eliassen was to pay it.

(Testimony of C. M. Bradley.)

Q. Mr. Eliassen was to pay it; that is the understanding. [255]

A. That would be my best opinion and judgment about it, from $25,000 to $30,000.

(No cross-examination.)

TESTIMONY OF PHILLIP A. HERSHEY, FOR PLAINTIFFS (RECALLED—REDIRECT EXAMINATION.)

PHILLIP A. HERSHEY, recalled as a witness for the plaintiffs, testified, in substance, as follows:

Redirect Examination by Mr. CROSBY.

The witness identified five separate documents, purporting to be Receiver's reports in this matter, dated respectively June 30, 1926, July 31, 1926, August 31, 1926, September 30, 1926, and October, 1926, as the reports referred to in the testimony given by the witness, when on the witness-stand a few days ago, and which the witness prepared as the account in this matter, from time to time, beginning with June, 1926, and ending in October, 1926.

Copies of those reports were sent to McManus, Ernst & Ernst and to Arthur F. Gotthold, Co-receiver in New York City; and the originals were delivered to Mr. Lieurance.

Each of those reports was prepared right after the close of the month, and was sent on to New York just as soon as finished, after the close of the different months, respectively. With the exception

(Testimony of Phillip A. Hershey.)

of the first report, I would say that copies of these reports were sent on to New York approximately fifteen days after the close of each of the months respectively. With the exception of the one dated June 30, I think they were sent to New York within fifteen days after the close of the month to which they refer. I believe the first report, dated June 30, was sent on approximately August 21.

The reports identified by the witness were then introduced and received in evidence and were identified as exhibits for plaintiff, Nos. 3, 4, 5, 6 and 7. (Observe that the first two of these [256] numbers duplicate numbers already assigned to exhibits; but the other exhibits were designated as Receiver's Exhibit 3 and Receiver's Exhibit 4; while these are designated as exhibits for plaintiff; and this will serve to distinguish them notwithstanding the duplication of the numbers.)

I have gone into the group of vouchers which are here in this Court, in connection with this business, to find the voucher referred to by Mr. Heney, having to do with transportation expenses and traveling expenses. I found it this morning. That is a voucher having to do with an expenditure of $806.68. There is a check for that amount drawn in favor of Mr. Lieurance. Attached to that voucher is a statement of the amounts.

(Counsel for plaintiff then offered to read the voucher into the record, but counsel for the objecting creditors stated that he desired to cross-examine

(Testimony of Phillip A. Hershey.)

the witness concerning it before it was read into the record.)

Cross-examination by Mr. HENEY.

The itemized statement, which appears to be on a separate sheet of paper, was attached on the 20th of August, 1926. In other words, this yellow sheet you see here is a duplicate of a remittance advice telling the party to whom it is being sent,—what items it is paying. To that duplicate remittance advice is attached a statement. There it is. (Indicating.) We sent a notice to the Western Dry Goods Company that we are paying the following bills, itemizing them, showing the discount and showing the total net; and attached to that the invoices which it pays. Likewise in this case we did the same thing.

The document referred to in the testimony of the witness was left in the custody of the Court. [257]

TESTIMONY OF EDWARD R. ELIASSEN, FOR PLAINTIFFS (RECALLED—CROSS-EXAMINATION).

EDWARD R. ELIASSEN, witness for the plaintiffs, recalled for cross-examination by Mr. HENEY.

I do not recall the date on which I prepared the petition for allowance on account, for the receivership. My recollection is that it was presented on the 10th of December here in San Francisco.

I recall very distinctly the conference I had in

(Testimony of Edward R. Eliassen.)

Mr. Kirk's office, when Mr. Lieurance, Mr. Kirk and myself were there together. That was on the preceding day; it was on the 9th of December. My recollection is that it was in the early part of the afternoon; somewhere around 2 o'clock; I may be mistaken. As to the time that I left there that day; if I knew when the meeting was held, I could give approximately the time, because the meeting did not last, I believe, more than half an hour. If the meeting was held at 2 o'clock, I would say we were through by 2:45 anyway at the latest.

I don't recall whether I had with me the petition for the allowance on account for Mr. Lieurance as Receiver and myself as attorney, at the time I was in Mr. Kirk's office; but I don't think I had it with me.

Q. What, if anything, was said by you or Mr. Lieurance to Mr. Kirk or to Mr. Moore in that interview about filing a petition for allowance of Receiver's fees and attorney's fees? [258]

Mr. CROSBY.—Pardon me a minute, Mr. Heney and your Honor, it appeared to me at the outset of this hearing that probably that phase of the pleadings was not to be gone into. We have no objection to it as far as we are concerned, but his Honor made some comment about there being some matters here which really were not before him. Did you have reference to that phase of it, your Honor,—on this pleading, your Honor?

The MASTER.—It seems to me that all the conferences and negotiations, except so far as they

(Testimony of Edward R. Eliassen.)

enter into the question of services, were not in issue,—were not an issue we have any interest in here. The question is, What is the proper fee for Mr. Eliassen's services? I myself do not see the materiality of the particular matter under investigation, but I shall allow it if Mr. Heney feels it will help me any.

Mr. HENEY.—I feel it is proper cross-examination and their version is set up in Mr. Lieurance's answer to our objection.

The MASTER.—I am aware of that, and there are issues taken on a great many matters which it seems to me are of no importance,—all these conflicting versions of what happened in various negotiations. I shall think about it when I come to decide the case.

Mr. HENEY.—The only materiality I feel it has is, it is cross-examination and has as such a bearing on the weight of the testimony given by Mr. Eliassen and Mr. Lieurance respectively in regard to the value of the services.

The MASTER.—You may proceed.

A. Now, Mr. Heney, there was quite a lengthy discussion at that meeting. Mr. Kirk, Mr. Moore, Mr. Lieurance and I were present,—I don't think anyone else,—during most of the time. Mr. Moore left before the meeting was over.

It had been called to our attention that the Receiver in New York, Mr. Gotthold, and McManus, Ernst & Ernst, the attorneys, were about to apply for allowances on account. They had filed a peti-

(Testimony of Edward R. Eliassen.)

tion, our information was; and Mr. Kirk, I think, had the same information; in which the attorneys asked for an allowance of $10,000 on account. [259]

Efforts had been made to or by several of the creditors and others a day or two before to ascertain what the probable allowances on account would be in the west—in the western jurisdictions; and at that meeting Mr. Kirk and Mr. Moore wanted to find out from Mr. Lieurance and me what allowances we expected to receive at that time.

It was conceded that that was the time to find out,—what the cost at that time would be; and that before the hearing on the application in New York took place something definite ought to be obtained here in the way of an idea for the creditors or Creditors' Committee, as to what the whole thing was going to cost.

Mr. Lieurance had answered several inquiries by letter and by wire, stating that he desired to leave this entire matter to the Courts,—the matter of the fixation of the allowances; and both Mr. Lieurance and I were asked at this meeting if it was still our attitude,—they had been kept informed,—and we said it was; that we were not prepared to state just what we should receive and were willing to leave it entirely to the discretion of the Courts.

Then followed a discussion as to a telegram which should be sent east, I think, to Mr. Fraser, the chairman of the New York committee; and Mr. Kirk called in a stenographer, and started to dic-

(Testimony of Edward R. Eliassen.)

tate a telegram; and suggestions were made from time to time by others at the meeting; and at last a telegram was prepared; and Mr. Moore left before his signature was on it, but Mr. Moore said it could be sent over his name, that which was sent on. Mr. Moore then left; he said he had to hurry away; and I took up with Mr. Kirk the matter of a stipulation and proposed order which he had sent to me thru the mails, and which he had asked me to sign—the stipulation of which he had asked me to sign.

I told him that the stipulation was all right; that the stipulation provided that the filing of certain claims which Mr. Kirk had caused to be sent to New York might be deemed as filed here in San Francisco. I signed the stipulation in his office, and handed [260] him the copy of the proposed order which he had submitted, and it was all right to me.

Then Mr. Lieurance brought up the matter of the telegram, and said, "Of course it will be sent right away. We don't want those men in the East to get that order before we find out what fees will be allowed here." And then either Mr. Kirk suggested—someone suggested,—anyone—someone of the three,—that we had better go ahead and get our orders as quickly as possible.

I then suggested that we would go out the next morning, and Mr. Kirk nodded his head and said, "Fine." I said, "You will be there, of course, Mr. Kirk?" He said, "I will, if you want me," or

(Testimony of Edward R. Eliassen.)

words to that effect. I am trying to give the substance now. I cannot give it word for word. I said I didn't think it was necessary. It was his privilege, of course. He said, "Well, I don't think it is necessary." I said, "Well, if that is the case, let me take this stipulation out with me to-morrow morning. I will go out there and obtain the order and file the petition, the stipulation and the order"; and he thanked me and said that was fine; and handed me the papers.

Then Mr. Lieurance spoke up and said, "We want to get this over as soon as possible"; and Mr. Kirk wanted to know then, how long it would be before we could get up to the northwest; and one of us suggested that we would go as quickly as possible to go; that we might leave the evening of the following day, and Mr. Kirk talked some more about that being fine; and we left and everything was cordial.

Next morning we went out to court and presented the application and got the order; and I think that that same evening we started for Portland,—started for the north.

I got the order in the morning session, at 10 o'clock. At the time of the talk in Mr. Kirk's office, if there was anything said about the eastern creditors objecting to the $10,000 [261] allowance to McManus, Ernst & Ernst, I do not recall it. It seems to me that the objections were largely the objections of people here; but it may be there had been telegraphic correspondence between the west and the

(Testimony of Edward R. Eliassen.)

east, and so it is possible there was objection there; I don't know. Mr. Moore said definitely that he didn't think they were entitled to such an amount at the time because—Mr. Kirk said the same thing during the conversation,—because very little of the work had been done there; all the concerns were here, all the stores were here; all the work was done here, both by the Receiver and the attorney.

I don't recall that it was said at that time, that the Receiver, Mr. Gotthold, had asked for $10,000, to be divided equally between him and Mr. Lieurance. I know objection was being made to the amount being applied for the attorneys; and the application was also I believe on the Receiver's allowance. The preparation of the telegram sent on that day had for its object the postponement of the matter there until it could be determined what allowance would be made.

My recollection is that Mr. Lieurance and I left for the north at about 7 o'clock in the evening of December 10; we went by train; Mr. Lieurance went on the same train with me, on that first trip.

Mr. Lieurance went out to Judge St. Sure with me on that morning at the time that I presented the petition for allowance on account. He was present in court and testified before Judge St. Sure.

The substance of his testimony was as follows: he was asked by the Judge just what—the Judge asked me first what the entire proceeding was; he wanted to get an idea of it; and then I asked a number of questions of Mr. Lieurance, it was upon

(Testimony of Edward R. Eliassen.)

his appointment and what had been done; and the Judge asked him a number of questions—quite a few questions. I know Mr. Lieurance,—my recollection is that he testified quite fully at the time; but I would not [262] attempt to relate now what the testimony was. My recollection is that I asked him how much he wanted on account at the time, and that his answer was, "That I will leave entirely to the discretion of the Court," or words to that effect.

Q. What was said—in testifying what was said by Mr. Lieurance, if anything, to give Judge St. Sure any idea of what Mr. Lieurance did, when and how he thought the compensation ought to be fixed?

A. I really cannot recall that, Mr. Heney.

Q. How was it fixed, do you know? On a percentage basis, or otherwise?

A. I don't recall that either. I recall that the question of percentage arose in several of the courts, but I do not recall now what courts. I don't think tho,—well, I don't know.

Q. Judge St. Sure was informed that McManus, Ernst & Ernst were asking $10,000 in New York,—wasn't he? A. Yes, sir, he was.

Q. And you advised him that you had performed practically all the work?

A. I didn't put it that way.

Q. The greater part of the work?

A. I let him know we had four ancillary juris-

(Testimony of Edward R. Eliassen.)

dictions here, and the stores were here, and that came out in Mr. Lieurance's testimony.

Q. Did you inform him that some of the large creditors were objecting to the allowance of $10,000 as to McManus, Ernst & Ernst as excessive?

A. I don't recall, Mr. Heney, whether I said that or not. I don't recall I knew that at the time; but I do recall—

Q. (Interrupting.) You knew that Mr. Moore was objecting to it?

A. Yes, sir; I knew Mr. Moore wanted to have the matter postponed until he could find out what was to be allowed here.

Q. Didn't he state that he considered it was excessive, what McManus, Ernst & Ernst were asking?

A. Yes, sir; I think he did. I think that was the concensus of opinion in the office there.

Q. You knew Mr. Moore was one of the largest creditors—$29,000.?

A. Yes, sir; he was one of the largest. [263]

Q. And also knew he was a member of the Creditors' Committee, of the New York Creditors' Committee?

A. I believe I did; and also of the Western Committee.

Q. Did you tell Judge St. Sure that Mr. Moore was objecting to the $10,000, as being excessive?

A. I don't recollect, at this time, whether I did or did not; but my impression is that I didn't. I didn't think of it at the time. I didn't think of it.

Mr. Lieurance has mentioned on numerous occa-

(Testimony of Edward R. Eliassen.)

sions, that he considered the only fair way of fixing his fee was on a percentage basis, on the total amount of money; but I couldn't pick out the occasion when he did speak of it; it is likely that he did speak of it at this time before Judge St. Sure. In all of these percentage conversations, Mr. Lieurance mentioned 5% as the percentage which he thought was fair.

Q. Upon the turn-over?

A. That was never mentioned, whether it was the turnover or on the gross sales, or on the net sales, so far as I can recall; but he did have in mind 5%; I know that; and I think he still has that in his mind.

At that time, I don't think there had been anything said about Receiver Gotthold being paid only in the New York jurisdiction, and Receiver Lieurance being paid for the services performed in the western jurisdictions. I think that came up afterward. Of course, that was spoken of a number of times.

I believe Mr. Lieurance went with me north on the same train, on the 10th of December, after I secured this order here. We first went to Portland. The application was not made in Portland upon our arrival there, because we found that Judge Bean was sitting in court in another division; I think he was down at the capital. So we went from Portland to Spokane; and the next application was made at Spokane after this one at San Francisco.

I have a record of the date when I made the ap-

(Testimony of Edward R. Eliassen.)

plication in Spokane; it was December 14, 1926. I was quite sure that it was in [264] the morning, 10 o'clock; and we finished in the morning. Mr. Lieurance testified there. I don't recall whether Mr. Lieurance said to the Court there, in substance, that he thought the only fair way or method of fixing the compensation for the receiver was to pay a percentage, and that in his opinion it should be 5%; my impression at the present time is that he did mention that.

We left Spokane that night for Seattle,—the first train we could get out of there was a night train. The train arrived in Seattle about 8 in the morning, and I am satisfied that we arrived at that time; that was on December 15. I presented the matter in Seattle on the same day, the 15th.

Q. Do you remember what time of day it was?

A. The best of my recollection is it was in the morning at 10 o'clock, but we had to wait several hours there in Judge Neterer's court, which took place in the afternoon, so I would not be positive about that. The hearing took place on that day in Seattle tho.

Mr. Lieurance testified before Judge Neterer, in much the same way. It is my recollection that he testified in substance that he ought to be paid on a commission basis of 5%.

We left Seattle, that afternoon, about 5 or 6 o'clock, for Portland. While in Seattle we received a telegram from Mr. Kirk.

(Testimony of Edward R. Eliassen.)

We got to Portland on December 16, and presented the matter there on the same day, December 16; my recollection is that it was in the morning at 10 o'clock.

Mr. Lieurance testified in the matter there before Judge Bean. He testified there in substance that in his opinion the only fair way to compensate him was to pay him by a percentage, on a percentage basis of 5% which was the least it should be.

The telegram received from Mr. Kirk in Seattle was then produced, and was offered and received in evidence, but instead of being identified as an exhibit, with the consent of all parties it was read into the record, and is as follows: [265]

"WESTERN UNION TELEGRAM.

26H F 48 4 EXTRA VIA H

San Francisco, Calif., 243P
Dec. 15, 1926.

E. R. Eliassen or A. F. Lieurance,
Seats 17–19 Car 125 Great Northern leaving—
leaving 430 PM Date Seattle, Wash.

In view of communication received by Walton Moore from Frazier, Chariman, New York Creditors Committee, it is highly desirable that you should not apply for receivers allowances or attorneys fees in Western jurisdictions until whole subject matter can be again discussed here upon your return.

JOSEPH KIRK, 322P"

Before leaving San Francisco, I saw the telegram

(Testimony of Edward R. Eliassen.)

dated December 6, 1926, from McManus, Ernst & Ernst to Mr. Lieurance. I believe that I saw all telegrams that came from Ernest & Ernst; but I am positive that I saw the telegram of December 6, 1926 above mentioned. (By consent of all parties, the telegram referred to was then read into the record, and is as follows:)

"WESTERN UNION.

A142 F YA 40

New York, N. Y., 1125A Dec. 6, 1926.

A. F. Lieurance, 1201 Central Bank Oakland, Calif.

We are applying today for order declaring dividend forty per cent, and also for allowances on account to receivers and ourselves. This is without prejudice to and cannot jeopardize your application in West for allowances to ancillary receivers and Eliassen.

McMANUS, ERNST & ERNST. 901A."

Thereupon, a telegram from McManus, Ernst & Ernst to A. F. Lieurance dated December 7, 1926, was offered and received in evidence, and was read into the record, as follows:

"WESTERN UNION.

A452F XD 285 Blue 1/60

New York, N. Y., 722P Dec. 7, 1926.

A. F. Lieurance, Esq., Central Bank Bldg., Oakland, Calif.

Order entered today by Judge A. N. Hand as

follows: 'This cause having duly come on to be heard on this seventh day of December, 1926, on the third report and petition of the receivers herein, and after hearing Irving L. Ernst, Esq., of counsel for the receivers, now, on motion of McManus, Ernst & Ernst, attorneys for the receivers, it is hereby ordered and decreed, First, that all debts entitled to priority for which proofs of claim have been filed where such proofs of claim are necessary, be paid in full. If the receivers doubt the validity of any priority claims filed, the validity of such claims will be determined in the manner hereinafter set forth. Second: that a first dividend of forty per cent be declared and paid to all creditors whose claims have been filed and allowed by [266] the receivers herein, and the receivers are hereby authorized to accept proofs of claim in due form from creditors whose claims appear on the books of the defendant to be valid, notwithstanding that the time limited for such filing has expired. Third: Michael J. Cardozo, Esq., is hereby appointed special master to hear the objections filed by the receivers to any and all claims filed, or that may hereafter be filed and to take the testimony offered by the parties, and to report the same to this court, with his opinion thereon.'

At request Creditors' Committee no allowances were fixed for receivers or counsel until receiving some indication from you what aggregate amount you and Eliassen will request from Western juris-

(Testimony of Edward R. Eliassen.)

dictions. Will you please wire us approximately what aggregate allowances will be so requested.

McMANUS, ERNST & ERNST. 523 PM."

I believe that before leaving here, I saw the telegram from A. V. Love to Mr. Lieurance, dated December 8, 1926; I do not think there is any question about that.

The telegram referred to was then offered and received in evidence and was read into the record as follows:

"WESTERN UNION.

A29 F ZC 40 NL

Seattle, Wash., Dec. 8, 1926.

A. F. Lieurance, 1401 Central Bank Bldg., Oakland, Calif.

William Frazer, Chairman Creditors' Committee wants my views by wire on full and final compensation for Ernst, Gotthold, Eliassen and yourself. Judge Hand has asked for our views and suggestion. Please wire me amounts you and Mr. Eliassen expect.

A. V. LOVE, 420A Dec. 9."

The attention of the witness was then directed to the telegraphic answer by Mr. Lieurance to McManus, Ernst & Ernst, dated December 8, 1926, and he was asked whether Mr. Lieurance showed the witness this telegraphic answer before they left here for the trip north, and the witness answered: "I don't know when it was received, Mr. Heney, but I saw the telegram; I am satisfied I saw it immediately afterward."

(Testimony of Edward R. Eliassen.)

Telegram referred to was then offered and received in evidence and was read into the record as follows:

"WESTERN UNION.

EXTRA RUSH

Oakland, California, December 8, 1926. [267]

McManus, Ernst & Ernst, 170 Broadway, New York, City, N. Y.

Replying to your telegram December 7th. No amount on account for attorneys and receivers in ancillary jurisdiction will be suggested by us. However, will ask for allowances on account, but amounts will be left entirely to discretion of courts. Feel this best and most fair method to pursue. Have not slightest idea of what courts will do, but feel they will be fair to both creditors and ourselves.

A. F. LIEURANCE."

I don't recall whether I assisted in preparing that telegram; but I am satisfied that I saw it before it was sent.

At the time we were applying before Judge St. Sure on December 10, there was something said to Judge St. Sure about our intention to apply in each of the other western jurisdictions. I think I informed the Judge at Spokane as to what had been allowed by Judge St. Sure. I know that some of the Judges, whether or not all I cannot recall now, asked what had been done previously, if anything; what had been done in the other jurisdictions. I have a distinct recollection that Judge Neterer

(Testimony of Edward R. Eliassen.)

asked the question, and also that Judge Bean asked the same question; whether Judge Webster did at Spokane I don't know.

In each instance, as we went along, we told them what had been allowed in the other jurisdictions. I didn't tell them the basis on which the allowance for the fee of the receiver had been made in each instance; but when the Judge,—the succeeding Judge—would ask Mr. Lieurance, Mr. Lieurance, would state just what he had said to the others of of the Judges in substance. I do recollect that. In substance or effect, he informed the Judge before whom he then was, that he had made the same statement to the preceding Judge; but he didn't put it that way, of course.

Telegram from Arthur Gotthold to A. F. Lieurance, dated December 8, 1926, was then produced and offered and received in evidence, and was read into the record as follows:

"WESTERN UNION.

A108F XF 19 2A New York, N. Y., 1051A
Dec. 8, 1926.

A. F. Lieurance, 1401 Central Bank Bldg., Oakland, Calif. [268]

I shall be glad to know your views as to allowances to receivers and counsel as soon as possible.

ARTHUR GOTTHOLD. 806A."

I believe I was present when Mr. Lieurance held a telephone communication with Mr. A. V. Love, in response to a telegram of Mr. Love which has

(Testimony of Edward R. Eliassen.)

been read into the record. I don't think that before Mr. Lieurance telephoned to Mr. Love I discussed with Mr. Lieurance the question what the substance of the reply to Mr. Love ought to be. My recollection is that it was Mr. Love who called Mr. Lieurance up. Mr. Love had sent a telegram; there was a telephonic conversation; but who called the other up, I don't recall.

A telegram from A. V. Love to William Fraser, dated December 9, 1926, was then produced; the cross-examination of Mr. Eliassen was temporarily suspended; and,—

TESTIMONY OF A. F. LIEURANCE, FOR PLAINTIFFS (RECALLED — CROSS-EXAMINATION).

A. F. LIEURANCE, witness for the plaintiffs, recalled for cross-examination, testified, in substance, as follows:

Mr. Love sent me the original telegram which you have read into the record. Later he sent me this copy of the telegram of December 9, 1926, from A. V. Love to William Fraser, together with a letter, informing me what had transpired in his correspondence with Fraser or someone in the East. That is how I came in possession of that telegram; Mr. Love sent it to me. It must have come after we had left on our trip north; I could not have received it before. I don't recollect whether he showed it to me while I was up there; if he did, I don't recall it.

(Testimony of A. F. Lieurance.)

The telegram referred to was offered and received in evidence and read into the record as follows:

"WESTERN UNION.

Dec. 9, 1926.

William Fraser,

c/o New York Credit Men's Assn.,

320 Broadway, New York City, New York.

Talked to Lieurance long-distance today. He will not suggest amount of fees. Says will be satisfied with courts order. Think Lieurance's compensation should be greater than Gotthold's, as he has done most of work. Think Ernst suggested fees altogether unreasonable, and that all parties should be satisfied with reasonable fees.

A. V. LOVE." [269]

(Cross-examination of Mr. LIEURANCE continued.)

Referring to the telegram from Walton N. Moore, to William Fraser dated December 9, 1926, Mr. Kirk sent that to me through the mail. I cannot recall when it was. It was shortly after it was sent,—the next day, I imagine; I don't know. That is the telegram which was formulated and dictated in Mr. Kirk's office, at the time I was there.

The telegram referred to was offered and received in evidence and read into the record as follows:

"WESTERN UNION.

December 9, 1926.

William Fraser c/o J. P. Stevens Co.,
23 Thomas Street, New York City.

Further answering your telegram. Receiver Lieurance and attorney intend having each ancillary Western court also order dividend forty per cent. To avoid possible conflict between Eastern and Western Courts as to amounts of allowances to receivers and their attorneys, as Chairman of Creditors' Committee here and member of New York committee, I earnestly request that question of such allowances be deferred for time being, until receivers and attorneys and committees can exchange views and come to some agreement concerning gross amounts to be asked for. Amounts of allowances to receivers and attorneys at this time by Judge Hand may prove unsatisfactory to ancillary courts who may order different amounts resulting in confusion. As you now know from yesterday's telegrams from Lieurance to Gotthold and attorneys McManus and Ernest, receiver Lieurance and attorneys in ancillary jurisdiction intend leaving amounts of allowances to discretion of ancillary courts.

WALTON N. MOORE."

(Mr. Lieurance then produced, for the use of counsel for the objecting creditors, a file containing the whole correspondence between Mr. Lieurance and Mr. Gotthold and McManus Ernst & Ernst.)

TESTIMONY OF EDWARD R. ELIASSEN, FOR PLAINTIFFS (RECALLED—CROSS-EXAMINATION).

Cross-examination of Mr. ELIASSEN (resumed).

Telegram from Arthur Gotthold to A. F. Lieurance, dated December 9, 1926, was produced and shown to the witness, who testified concerning it as follows: I don't recall seeing that before we left here to go north on December 10. Most of those telegrams were sent at night and got to the office the following morning, so that being dated December 9, I could not state whether it was received on that day or not.

There was some discussion between counsel and witness and the Master concerning the dates appearing on the telegram, which [270] indicated that it was sent from New York at 11:12 A. M. (New York time) and was received at Oakland at 8:45 A. M. (Oakland time); and the witness testified: "All I can do is to speculate as to the time I saw the telegrams"; Mr. Lieurance was in the habit of showing me the telegrams as soon as he received them; I have examined hundreds of them.

The telegram referred to was then offered and received in evidence and was read into the record as follows:

(Testimony of Edward R. Eliassen.)

"WESTERN UNION..

A 119 F EP 64

ZA New York, N. Y. 1112A Dec. 9, 1926.

A. F. Lieurance, 1401 Central Bank Bldg., Oakland, Calif.

Suggested interim allowances in New York are ten thousand to receivers to be divided equally. Ten thousand to New York counsel. New York counsel to make no application in ancillary jurisdictions. Figures indicated are satisfactory to court and generally to creditors, but before payment is made we hoped to get some estimate of total allowances so that figure might be kept down to reasonable amount.

ARTHUR F. GOTTHOLD. 845a"

I cannot recall whether or not I had that telegram at the time of the meeting in Mr. Kirk's office on the afternoon of December 9.

A night letter, dated December 10, 1926, from A. F. Lieurance to Arthur F. Gotthold was then shown to the witnesses who testified: I believe that I assisted in the preparation of that. The night letter referred to was then offered and received in evidence and read into the record as follows:

"WESTERN UNION.

NIGHT LETTER

Oakland, California, December 10, 1926.

Mr. Arthur F. Gotthold,

Joint Receiver, R. A. Pilcher Co., Inc.

#27 William Street, New York City, N. Y.

I purposely delayed replying to your telegram of December ninth, requesting aggregate amount of fees to be allowed attorneys and receivers pending result of meeting with San Francisco Board Trade [271] and Walton Moore, held late yesterday afternoon in San Francisco. As previously stated Eliassen and myself feel in fairness to creditors, attorneys and receivers, matter of compensation should be left entirely to courts without suggestion or recommendation on our part as to amounts. This plan will be followed in ancillary jurisdictions, and is supported by Walton Moore, A. V. Love and San Francisco Board Trade. Their views and recommendations in this record were communicated to Mr. Fraser yesterday, by wire, in reply to his request to them for same, as Judge Hand had evidently asked Creditors Committee for recommendations as to aggregate allowances to be made attorneys and receivers. In view of fact that fixation of fees and compensation will be left to courts in Western jurisdictions, it is impossible for me to even guess at amounts which will be allowed. It has been suggested here, and evidently at New York also, that you receive your compensation in parent

(Testimony of Edward R. Eliassen.)

jurisdiction, and I look to courts in ancillary jurisdiction for my compensation. There is no doubt this will simplify matters and keep aggregate amount to be allowed down to reasonable figure, as was suggested at yesterday's meeting. However, no one can foretell how this will work out. Please let me have your views regarding this arrangement. Application for orders to pay forty per cent dividend and allowances on account will be made in Northwest next week.

A. F. LIEURANCE."

Q. What time of day was that telegram sent, do you remember? A. No.

Q. Well, when was it prepared? Was it after you had been before Judge St. Sure?

A. I cannot recall that, Mr. Heney. There is a volume of telegrams and a volume of correspondence. I have not the slightest recollection of when it was drawn up. You ask me the date. Without referring to it I could not remember.

Q. No. But you could tell whether it was on the same day you got your allowance here and started North couldn't you? That would be of some peculiar interest to you. Wasn't it?

A. It must have been, because it was dated that day; yes.

Q. I mean, doesn't your recollection go back so that you remember that on that day Mr. Lieurance did send that telegram, which you helped him prepare?

A. I remember he showed me that telegram, but

(Testimony of Edward R. Eliassen.)

I cannot recall the time, the day or anything about it. I know I have seen that telegram; and I am satisfied that he took it up with me before he sent it off; if that is what you want; but I cannot give the hour, Mr. Heney; and I wager you could not either, if our positions were reversed. [272]

A telegram dated December 15, 1926, from Arthur F. Gotthold to A. F. Lieurance as then shown to the witness, who testified concerning it as follows: I have seen that telegram before. I do not remember whether or not I saw it in Seattle while I was there making these applications for allowances. I do not remember whether or not Mr. Lieurance got a telephone message at Seattle, from the Oakland office, in regard to it. This is the first time I have heard of a telephonic conversation between his office and himself at the time. I don't know of any such.

Q. It was received at his office at 9:37 in the morning of December 15th.

A. It may have been forwarded by the office and embodied in a telegram to Mr. Lieurance during the time we were away. We frequently received telegrams from the office,—many of them.

(It was then stipulated that the telegram just referred to as received at the Oakland telegraph office at 9:37 A. M. on December 15, 1926; and that it was forwarded on the same day by wire to Seattle, in a telegram from an employee in the Oakland office, to Mr. Lieurance.)

(Testimony of Edward R. Eliassen.)

(Cross-examination of Mr. Eliassen continued.) I remember seeing that telegram, and I assume that I saw it in Seattle.

The telegram from the Oakland office to Mr. Lieurance, forwarding the telegram from Gotthold, was offered and received in evidence and read into the record as follows:

"Oakland, California, December 15, 1926.

Mr. A. F. Lieurance, Washington Hotel,
Seattle, Washington.

Wire just received from Gotthold, 'Regret we have had no further word in answer our telegrams and Fraser's letter. Further answering your telegram December tenth, it has not been suggested here that I receive allowance in New York only. I am informed you and Mr. Walter Ernst agreed both of us to apply for allowances in New York and also in each of ancillary jurisdictions in event that separate applications should be made. We are asking Judge Hand for a hearing on Friday reference interim allowances. Shall be glad to know your views before that time.

MARY L. RAEBURN."

(Thereupon, the cross-examination of Mr. Eliassen was again temporarily suspended.) [273]

TESTIMONY OF A. F. LIEURANCE, FOR PLAINTIFF (RECALLED — CROSS-EXAMINATION).

A. F. LIEURANCE, witness for the plaintiff, recalled for cross-examination, testified, in substance, as follows:

The attention of the witness was directed to a telegram sent from Oakland, to Arthur Gotthold, dated December 15, 1926, and signed "A. F. Lieurance"; and the witness testified concerning it as follows: That could have happened. In communicating with Oakland it might have been incorporated with other matters even though I might be in Seattle at the time.

The attention of the witness was then directed to the fact that the telegram contained statements known to the witness personally, viz.: "I have received no letter from Mr. Fraser" and the witness testified concerning it as follows: "When I got this telegram repeated to me I may have instructed the Oakland office in some way. I did it on a number of occasions.

The telegram referred to was then offered and received in evidence and read into the record as follows:

"WESTERN UNION.

Oakland, California, December 15, 1926.

Mr. Arthur F. Gotthold,

Joint Receiver, R. A. Pilcher Co.,

#27 William Street, New York City, N. Y.

Replying your wire December 15th, I have re-

(Testimony of A. F. Lieurance.)
ceived no letter from Mr. Fraser, neither did I write to him. No agreement has been made between Walter Ernst and myself regarding receivers compensation. As wired you December 10th the suggestion was made that you take all of the allowance made in New York, and I take allowance to be made here in West. This is I believe fair and equitable. Does this plan meet with your approval.

A. F. LIEURANCE."

(Cross-examination of Mr. Lieurance continued.) I was in Seattle at the time, and I must have given the instructions here, because Miss Raeburn is a most capable girl; and in many cases like that, knowing the situation and circumstances thoroly, she would probably compose a telegram, which I would give her the substance of.

(Mr. Lieurance questioned by Mr. CROSBY.) I would communicate with Miss Raeburn by wire. That accounts for the telegram, going [274] back to New York on the 15th.

(Cross-examination of Mr. Lieurance by Mr. HENEY resumed.) The telegram that I sent to Miss Raeburn instructing her to send a telegram to Gotthold in my name,—that is, the one received by her should be in the files in my office; there is no question about that; I am looking for it; I don't find it here.

TESTIMONY OF EDWARD R. ELIASSEN, FOR PLAINTIFFS (RECALLED—CROSS-EXAMINATION).

EDWARD R. ELIASSEN, witness for the plaintiffs, whose cross-examination was suspended, resumed the stand, for further cross-examination by Mr. HENEY.

I haven't any idea how Mr. Kirk came to know the number of the seats on the car and the car, on which we were leaving from Seattle. I might say I was somewhat surprised. Of course, it was a matter of no secrecy.

(The attention of the witness was directed to the telegram from Arthur F. Gotthold to A. F. Lieurance, dated December 16, 1926; and the witness was asked whether he recalled seeing that telegram "at or about that time"; and the witness answered:) I remember seeing the telegram; but at what time, I could not say.

The telegram referred to was then offered and received in evidence and read into the record as follows:

"WESTERN UNION.

A201F EJ 63

ZA New York, N. Y., 1143A. Dec. 16, 1926.

A. F. Lieurance, 1401 Central Bank Bldg., Oakland, Calif.

Replying your wire December 15, Fraser's letter should have reached you. My information regarding allowances came from Mr. Walter Ernst. I

(Testimony of A. F. Lieurance.)

regret misunderstanding. Your suggestion as to allowances acceptable to me, but I hope that aggregate of allowances will be kept to reasonable figure. Hearing before Judge Hand set for afternoon of December 17th. Will submit matter to him then.

ARTHUR F. GOTTHOLD. 9:44A."

(At this point, the cross-examination of Mr. Eliassen was again suspended; and)—

TESTIMONY OF A. F. LIEURANCE, FOR PLAINTIFFS (RECALLED—CROSS-EXAMINATION).

A. F. LIEURANCE, witness for the plaintiffs, was recalled, for [275] further cross-examination by Mr. HENEY.

If there had been a telegram from Seattle to the Oakland office, it would not be filed in this file which is in court. It would be filed with private correspondence,—I mean a different correspondence file. We had it here the other day but I didn't bring it back. This file is correspondence between myself and the New York people, and not personal messages going between Miss Raeburn and myself.

The next telegram appearing in this file, from Walton N. Moore to Mr. Fraser, dated December 16, 1926, is a copy that came from Mr. Kirk or Mr. Moore. I am inclined to think it came from Mr. Kirk; that is, a copy was sent to me. We were in Portland the 16th; this telegram came from my office no doubt.

TESTIMONY OF EDWARD R. ELIASSEN, FOR PLAINTIFFS (CROSS-EXAMINATION RESUMED).

Cross-examination of Mr. ELIASSEN (Resumed.)

Mr. Lieurance and I had a talk with Mr. Kirk and Mr. Moore at Mr. Kirk's office, shortly after our return from Portland,—after December 16. The telegram last above mentioned was not before us at the time of the meeting just mentioned; but I know that we saw it before that time. Our information at the office was it had been forwarded by Mr. Kirk.

The telegram just referred to was then offered and received in evidence and read into the record as follows:

"WESTERN UNION.

Willam Fraser,

c/o J. P. Stevens Co.,

23 Thomas Street, New York City.

Telegram received. To my utter astonishment I received following telegram to-day from receiver Lieurance at Portland. 'Work completed here this morning. Orders obtained all jurisdictions pay 40 per cent dividends. Allowance to attorney California ten thousand. Spokane twenty-five hundred. Seattle five thousand. Portland ten thousand. Total twenty-seven thousand five hundred. Allowance to receivers California ten thousand, divided seventy-five and twenty-five per cent. Spokane five thousand division to be made at final hearing. Seattle thirteen thousand, divided twelve and one.

(Testimony of Edward R. Eliassen.)

Portland fourteen thousand five hundred, divided thirteen five and one. Total forty-two thousand five hundred. Phoned above information to Mr. Love this morning. Will be home Saturday."

Receiver Lieurance and his attorney were present when telegram of December ninth to you was prepared and consented thereto. In view [276] of this fact we consider applications for allowances in Western jurisdictions which were made without any notice to Creditors Committee here as being unwarranted, and in violation of understanding stated in telegram of December ninth. We contemplate making immediate application to Western courts to set aside the allowances as excessive and exorbitant and give creditors full opportunity of being heard with respect to the allowances. Will your committee join in making this application, or request to Western courts and bear their share of expenses and fees incident thereto.

WALTON N. MOORE."

The telegram from Fraser to Walton N. Moore, dated December 16, was then produced; (the witness Lieurance stated that he supposed this copy of the telegram came from Mr. Moore, that all of those copies of telegrams came from Mr. Fraser or Mr. Moore, at about the time of the dates of them; "I suppose they were transferred quickly").

The telegram last referred to was then offered and received in evidence and read into the record as follows:

"New York, N. Y., Dec. 16

Walton N. Moore, care Walton N. Moore D. G. Co.,
San Francisco, California.

Hearing Friday before judge on allowances. Unless hear from you by wire will assume no change in previous stand.

WILLIAM FRASER."

The objecting creditors then offered in evidence a letter from Arthur F. Gotthold to Mr. Lieurance, dated December 18, 1926, which letter was received in evidence, and read into the record as follows:

"GOTTHOLD, PITKIN, ROSENSHON & TRAVIESO,

Counsellors at Law,
27 William Street, New York.

AFG./HAP. December 18, 1926.

Re: R. A. Pilcher Co.,

Dear Mr. Lieurance:

Mr. Irving Ernst and I appeared before Judge Hand late yesterday afternoon. Members of the Creditors' Committee and representatives of large creditors were also present.

Mr. Fraser read a telegram from Mr. Moore quoting your telegram to him. This was the first knowledge I had that orders for distribution and for allowances had been made in the four Western jurisdictions. The result of making separate applications is just what I feared, namely excessive allowances.

In view of the telegrams passing between us I

am somewhat puzzled as to why you included me in your applications. As I agreed [277] to apply only in New York the amounts awarded me in California, Oregon and Washington can, of course, be eliminated.

It is particularly unfortunate that so much of the assets should be spent for the cost of administration in view of the notice of the result of sales sent to creditors and signed with both our names. I saw a copy of this yesterday for the first time. I am afraid that creditors would gather from it the impression that they would receive much larger dividends than can be paid.

The result of the hearing was that *ad interim* allowances, of $7,500 to Messrs. McManus, Ernst & Ernst and of $5,000 to me, were made and the creditors here decided to cooperate with the Western creditors in an effort to have the allowances in the Western jurisdictions reconsidered and materially reduced. On the information available here, we all thought these allowances very high.

In view of the splendid work you have done in disposing of the stores it would be too bad to have a controversy over a matter of this kind. I hope that when you have fully considered the matter you will feel like consulting with the Creditors' representatives and voluntarily agreeing to a reduction to more reasonable figures. My compensation, as I have said, is out.

Please let me hear from you about this as soon as you can and also about your plans for the pay-

ment of the dividend. How are you coming along with the landlords and the adjustments with the purchasers?

Faithfully yours,
ARTHUR F. GOTTHOLD.

A. F. Lieurance, Esq.,
1401 Central Bank Bldg.,
Oakland, California."

The objecting creditors then offered in evidence the telegram from McManus, Ernst & Ernst to A. F. Lieurance, dated December 18, 1926, which telegram was received in evidence and read into the record as follows:

"WESTERN UNION.

New York, N. Y., 238P Dec. 18, 1926.

A 292F YH 40 Blue
A. F. Lieurance,
3840 Grant Avenue, Glencourt 2362,
Oakland, Calif.

Judge Hand awarded the following allowances to-day on account to us: seventy-five hundred. To Mr. Gotthold, five thousand. Mr. Hershey promised to send on money equal to one-half of these allowances. Will you please transfer the necessary funds.

McMANUS, ERNST & ERNST."

The objecting creditors then offered in evidence a telegram from A. F. Lieurance to Arthur F. Gotthold, dated December 20, 1026; which telegram was

received in evidence and read into the record as follows:

"WESTERN UNION.

Mr. Arthur F. Gotthold,
Joint Receiver R. A. Pilcher Co.,
#27 William Street, New York City, N. Y.

Dec. 20, 1926. [278]

I acknowledge receipt of your telegram of December 16th, stating that suggestion contained in my telegram to you of December 15th, that you take all receiver's compensation allowed in New York, and I take all allowances made to receivers in ancillary jurisdictions is acceptable to you. I hereby agree to this arrangement. Pursuant to this agreement between ourselves I am sending you air mail to-day assignment of any fees to which I am entitled in the New York jurisdiction, and would suggest you mail me an assignment of your interest in any allowances made to receivers in Western jurisdictions. Payment of forty per cent dividend to creditors starting to-day.

A. F. LIEURANCE."

The objecting creditors then offered in evidence a telegram from Arthur F. Gotthold to A. F. Lieurance, dated December 21, 1926; which telegram was received in evidence and read into the record as follows:

"New York, N. Y., December 21, 1926.

A. F. Lieurance, 1401 Central Bank Bldg.,
Oakland, Calif.

Your telegram December 20th received. Your

(Testimony of Edward R. Eliassen.)

telegram December tenth suggested I receive compensation here and you in West. I accepted this arrangement and therefore did not apply for allowance for you here, and am surprised you applied for allowances for me. I consider assignment of allowances improper. Wrote you December 18th air mail that I consider Western allowances too high, and that those made me should be eliminated. If paid they will be immediately deposited in receivership account here. Are you paying dividend to all creditors or remitting funds here for payment to Eastern creditors.

ARTHUR F. GOTTHOLD."

Cross-examination of Mr. ELIASSEN (Resumed).

At the time that I made the trip to New York, when the depositions of Walter Ernst and Mr. Fraser were to be taken, I did not go on any other business than that of taking those depositions. I did not learn, before leaving San Francisco, that William Fraser was in Europe.

I recall a conversation with you (Mr. Heney) on the street-car going down town; and I remember asking what testimony was expected from those witnesses, and suggested that possibly we could stipulate what their testimony would be; but I gathered from your (Mr. Heney's) talk, that you didn't know exactly what they intended to prove by these witnesses. You may have said that Mr. Fraser was not there, but I don't recall that. I was somewhat surprised when [279] I got to

(Testimony of Edward R. Eliassen.)

New York, to find that he was in Europe and had been there for over a month. I have no recollection that you said that Mr. Fraser was in Europe and would not be back by the date for which the deposition was set; but if you recall that, I will say that I know you said it; but I have no recollection of it now.

Redirect Examination by Mr. CROSBY.

Mr. Fraser was not in New York, and his deposition was not taken, but the depositions of Mr. Ernst and Mr. Arthur F. Gotthold were taken on the day fixed in the notice. Their names appeared in the notice, as witnesses whose depositions would be taken. The time was fixed (and stated in the notice) on which the depositions were to be taken. The notice was left in my office while Mr. Lieurance and I were in the northwest in the matter of the hearing of the final accounts, by reference to my statement, which I have now before me. I can tell when I arrived from that trip, arrived back in Oakland. I arrived back in Oakland on August 3d; and the time fixed for the taking of the depositions was August 16th, at New York.

I did not have any talk with Mr. Heney (after receiving this notice) concerning the proposition of questions and answers to be prepared here, and submitted there; but I did before that time; whether it was in that conversation I had with Mr. Heney or at some other time,—I tried to find out whether or not we could stipulate, and as to whether or not we could submit the matter on written interroga-

(Testimony of Edward R. Eliassen.)

tories. Mr. Heney thought that Ernst's testimony would relate only to the Hershey matter. (Mr. Heney then stated in the record that he did not know at that time what Mr. Fraser's testimony would be, or what Mr. Gotthold was expected to testify to.)

In order for me to intelligently cross-examine those people whose depositions were being taken, I felt that it was necessary for me to go personally; and I took back a great bulk of data, and appeared at the time, and participated in the taking of the depositions of those two gentlemen. [280]

Q. Now, in the matter of the presentation of the applications to the various courts for these interim allowances: When you presented those applications, did either you or Mr. Lieurance state to the Court at the outset, in the matter, what you considered or either of you considered should be allowed?

A. No; we refrained from doing that very thing.

Q. Just state to his Honor what transpired in a general way which went into the record at all, any reference to amounts, either by you or Mr. Lieurance?

A. My recollection is, that in all jurisdictions a statement of the matter being presented was first made by me,—a statement that an order had been made in New York permitting the payment of a dividend of 40%; stating that the matter of allowances to the attorneys had been deferred, altho applications had been made for allowances; stating that we desired upon the showing—I don't recall

(Testimony of Edward R. Eliassen.)

whether I read the report or stated the substance of the report to the Court here in San Francisco; I think I stated the substance of the report, showing there was ample money on hand to make the payment proposed as to the dividend. I then put Mr. Lieurance on the stand and questioned him concerning the services rendered by him up to that time, asking him about the report which he had filed; whether or not it was true, and propounded such questions as I thought would draw from the witness the facts which we expected to present to the Court. We aimed to give the Court a good idea of just what had transpired, I remember, in this jurisdiction.

The Judge asked Mr. Lieurance what he expected, and Mr. Lieurance reiterated what he said in Mr. Kirk's office and had said in his telegrams; that that was a matter he wanted to leave entirely —I don't know whether he used the word discretion,—entirely to the Court, without naming any amount. I do recall the Judge asked him if he had any idea; and I do recall he stated, and I speak now of this jurisdiction, that he had no idea, and that Mr. Lieurance was [281] then pressed, and he said something; whether he said that he felt it would be fair to determine the matter of his allowance or the matter of his fees upon a percentage basis, I don't know. I don't think he did.

Q. That was in this jurisdiction?

A. That was in this jurisdiction; yes. In the other jurisdictions practically the same procedure

(Testimony of Edward R. Eliassen.)

was gone thru with. We informed the Court in each succeeding jurisdiction of what had taken place in the previous applications, in the matter of the previous applications in the courts we had already visited; and we also informed the Courts of what had been done in San Francisco and in Portland and in Spokane,—no; Portland was the last on this trip,—in Seattle and then in Portland.

In each case the Judge insisted upon knowing what Mr. Lieurance's idea was; and I know that he was rather loath, very loath, to give it; but he did suggest to two or three of the Judges he felt that perhaps a percentage basis was the basis upon which to make the compensation; and I recall this, that Judge Webster thought it was perfectly fair, and wanted Mr. Lieurance to state what percentage. He was pressed on that, and at last suggested that he thought 5% would be fair, and mentioned something about a real estate broker being given 5%. I know that after being pressed he mentioned 5% in Judge Neterer's court in Seattle, and I know that Judge Neterer commented very favorably on what he had done, and also gave it as his opinion that that method of calculation or basis was a very fair one.

In Portland Judge Bean took the same attitude, and made the same comment, that he thought it was a fair way of determining just what should be paid. I do know that in each instance that Mr. Lieurance was very hesitant about stating what his idea was, —whether he had any idea on that or not I do not

(Testimony of Edward R. Eliassen.)

know; but he did state finally he thought a percentage basis would be the proper basis of calculation. [282]

Q. In the first instance, when questioned by the Court, was anything said by Mr. Lieurance,—anything said about it being left to the judgment of the Court? A. Absolutely, yes.

Q. In every instance? A. In every instance.

Q. How about your own compensation as to these allowances made on account?

A. Nothing was said about any basis. I did tell Judge St. Sure, that an application had been made by the attorneys at New York for $10,000, on account. He had before him what had been done, and he fixed the allowance at $10,000 without any further comment; and then, when he fixed Mr. Lieurance's compensation, he didn't consider any percentage basis; he just felt the Receiver should receive the same amount.

Mr. HENEY.—That is stating a conclusion, Mr. Eliassen.

A. It is. Lawyers make very poor witnesses.

Examination by the MASTER.

Q. Nothing was said about a percentage?

A. Nothing was said about a percentage at that time, as I recall it.

Q. What was the odd figure in the Portland hearing of the Receiver's percentage, ending in 51 cents or some such figure; on what basis was that calculated?

(Testimony of Edward R. Eliassen.)

A. Judge Bean calculated 5% on the gross sales.

Redirect Examination Resumed by Mr. CROSBY.

Q. 5% on what?

A. On the gross sales; sales of merchandise over the counter, which amounted to almost half a million dollars, and the prices the stores brought, $257,000 odd dollars; $257,600.

At this point counsel for plaintiffs asked counsel for the objecting creditors, "just what your purpose is in offering those telegrams"; and counsel for the objecting creditors answered that his purpose as to "part of them" was as follows:

As part of the cross-examination of the witness; and it is on the theory, that if the Master interprets them as I do it will lessen the weight to be given the testimony of the witnesses; and, secondly, on the proposition, that if [283] the facts are as we shall contend, then certainly Mr. Eliassen is not entitled to any compensation for resisting these objections and neither is Mr. Lieurance, or for time expended in resisting them.

Examination of Witness Eliassen by the MASTER.

These orders of allowance made in the various jurisdictions to the Receiver, and to myself as his attorney, were not set aside. By stipulation, the amounts on account were reduced, so that Mr. Lieurance has received now, $15,000 on account, and I received a like sum on account. Those stipulations are on file, because orders have been based upon them; and as I suggested to Mr. Heney last

(Testimony of Edward R. Eliassen.)

week, the amount we are asking for now is the fixed fee, but, of course, credit is to be given if it exceeds $15,000—for the $15,000 on account.

At this point, by consent of counsel and with the permission of the Court, counsel for the objecting creditors was permitted to call a witness for the objecting creditors, concerning a formal matter, and with the understanding that the plaintiff would resume the introduction of their evidence after the completion of the testimony of the witness for the objecting creditors.

TESTIMONY OF F. A. BENNETT, FOR PLAINTIFFS.

F. A. BENNETT, called and sworn as a witness for the objecting creditors, testified, in substance, as follows:

I am manager of the Western Union Telegraph Company, at Oakland, California; and have been in that position three and one-half years.

(The telegram dated December 10, 1926, from A. F. Lieurance to Arthur F. Gotthold, commencing with the words, "I have purposely delayed," and which was heretofore read into the evidence, was shown to the witness, and the witness testified concerning it as follows:)

That telegram (night letter) was filed in Oakland at 6:02 P. M., December 10, 1926. This is the original telegram, which I have produced in compliance to your summons.

(No cross-examination.) [284]

TESTIMONY OF EDWARD R. ELIASSEN, FOR PLAINTIFFS (RECALLED — REDIRECT EXAMINATION).

EDWARD R. ELIASSEN, witness for the plaintiffs, recalled for further redirect examination by Mr. CROSBY.

In making my applications to the Court for interim allowances to myself and Mr. Lieurance, I did not intend to induce the Court to understand and believe anything contrary to, or other than, what the facts were.

I did not conceal any facts from the Court upon any of these applications.

Recross-examination by Mr. HENEY.

Q. Did you tell Judge Webster, or the Judge at Seattle, that the application for the allowances were being made upon an understanding with the Creditors' Committee that neither Mr. Lieurance or yourself would make any suggestion or recommendation whatsoever in regard to the amount thereof?

A. The statement that we would not make any suggestion was made to all the Judges.

Q. What did you say to them?

A. I do not recall the language, Mr. Heney; but I know we did say,—we said we wanted to leave it to the discretion of the Court,—whatever the Court felt was fair in the premises would be satisfactory to us. That was made clear to all of the Judges.

(Testimony of Edward R. Eliassen.)

Q. Did you state to the Judges that you had an agreement with the Creditors' Committee, that you would not make any suggestion or recommendation, neither you or Mr. Lieurance, as to the amount to be allowed either of you,—and your failure to do so would be in violation of that agreement?

A. I don't recall I put it that way. I don't recall having mentioned any agreement made with any committee.

I cannot say that on December 14, 1926, when I was at Spokane, I knew that the creditors were objecting to the amount that was being asked for in New York, and were earnestly endeavoring to find out what the total amount was going to be, in order to find out whether they wanted to object to it or not. I did know they wanted [285] to know what the entire amount was going to be before the hearing of that application of McManus, Ernst and Ernst there. The feeling, as it was explained to us was, that those people were asking for entirely too much, because they had done so little; that the work was being done out here; the business was here; and they felt those people should not get the major portion of the fees.

Q. But you didn't think the creditors had any objection to any amount which you folks might get?

A. We didn't know what we were going to receive in advance; and the creditors didn't know. The fact that some of the creditors, after we came back, objected, showed it was not satisfactory to all of them.

(Testimony of Edward R. Eliassen.)

Q. What I am trying to get at is, that at the time you were there in Spokane, didn't you understand that the creditors were desirous of keeping the amount down as low as possible?

A. That was suggested in one of the telegrams thereafter; also in Mr. Gotthold's letter; but whether that suggestion came to us before or after I do not know; but I naturally assumed they were wishing to get out of the estate as much as possible for themselves, and had in view the keeping down of the expenses.

Q. This telegram of Mr. Lieurance to Mr. Gotthold, dated December 10, 1926, contains this language: "As previously stated Eliassen and myself in fairness to creditors, attorneys and receivers matter of compensation should be left entirely to courts without suggestion or recommendation on our part as to amounts. This plan will be followed in ancillary jurisdictions and is supported by Walton Moore, A. V. Love and San Francisco Board of Trade. Their views and recommendations in this regard were communicated to Mr. Fraser yesterday by wire in reply to his request to them for same, as Judge Hand had evidently asked creditors' committee for recommendations as to aggregate allowances to be made attorneys and receivers." In view of that telegram didn't you feel that the creditors were entitled to [286] be heard, if you did make any suggestion of allowances to the Court, whether in response to questions or not?

(Testimony of Edward R. Eliassen.)

A. We went into court with the positive intention of saying nothing at all about amounts; but when questions were asked us point-blank which required a reply, we felt we had to give some answer to them.

Q. Why didn't you give him the answer that you were under obligations, that you had already represented that you would not do so, and you thought the creditors would want to be heard at the same time if you did make any suggestions or recommendations?

A. The thought didn't occur to me at the time. I am sure it wasn't intentional, or with the thought of keeping anything from the Court.

Q. This telegram of December 10th from Mr. Lieurance to Mr. Gotthold contained the further statement: "In view of the fact that fixation of fees and compensation will be left to courts in Western jurisdictions it is impossible for me to even guess at amounts which will be allowed." At the time that telegram was formulated and before it was sent you already knew what had been allowed by Judge St. Sure in this jurisdiction, didn't you?

A. When was that telegram sent?

Q. Six o'clock in the evening on December 10th, 1926.

A. I know such a telegram was sent; but I don't know when it was sent, and I didn't prepare it; I know I was shown it, because I have seen it.

Q. The telegram does not say anything about San Francisco at all. It does wind up by saying,

(Testimony of Edward R. Eliassen.)

"Application for orders to pay forty per cent dividend and allowances on account will be made in Northwest next week." Why wasn't anything said about the fact the application had been made that day in San Francisco?

A. I don't know that. Mr. Lieurance may have written that from his home; he may have written it in his office before going over to San Francisco. I don't know. I didn't file that telegram, and do not recall now when it was written. I do know this, that neither Mr. [287] Lieurance nor I ever intended to hide anything from anybody.

Q. That did conceal from Mr. Gotthold the fact he was to get 25% of the fee already allowed here, if it was sent at six o'clock.

A. If it was written at 6 o'clock. It may have been deposited at his office for transmission before he went to San Francisco.

Q. If you had a hearing before Judge St. Sure here on December the 10th, it did conceal it from Mr. Gotthold? A. It did. Yes, sir.

Q. You did ask Mr. Gotthold to agree to the proposition that Mr. Lieurance should have all of the fees out here in the western jurisdiction?

A. That suggestion was made in the telegram.

Q. After advising him of the fact that 25% of $10,000, was it?—what amount had been allowed here—yes; now, why didn't you notify Mr. Kirk or Mr. Moore on December 10th of what had been allowed here in San Francisco?

A. The understanding was we were to go to the

(Testimony of Edward R. Eliassen.)

various courts and get an aggregate for him. I don't recall whether we communicated with him or not; but that was the understanding; we were to—

Q. (Interrupting.) You say it was the understanding; that is a conclusion. I am asking what was said?

A. Well, it was the sense of the meeting—

Q. No; I don't think that will get what we want.

A. I don't recall just what was said, Mr. Heney.

Q. In substance.

A. I do know this: It was agreed that we could not agree to fix the amounts of allowances between or among ourselves; that the matter of allowances was going to be left to the courts; and we were going to Judge St. Sure's court next morning,—we were going to court; we didn't say Judge St. Sure's court,—to present the application there and follow that with applications in the northwest as soon as possible afterward.

Q. What did you understand as to this agreement when in Mr. Kirk's office and this telegram was formulated and sent by Mr. Walton N. [288] Moore to Mr. Fraser of the Creditors' Committee in New York? "Further answering your telegram receiver Lieurance and attorney intend having each ancillary Western court also order dividend forty per cent. To avoid possible conflict between Eastern and Western courts as to amounts of allowances to receivers and their attorneys as chairman of creditors' committee here and mem-

(Testimony of Edward R. Eliassen.)

ber of New York committee I earnestly request that questions of such allowances be deferred for time being until receivers and attorneys and committees can exchange views and come to some agreement concerning gross amounts to be asked for." What did you understand that to mean?

Mr. CROSBY.—Did you read all of the telegram, Mr. Heney?

Mr. HENEY.—All that bears on that. (Reading.) "Amounts of allowances to receivers and attorneys at this time by Judge Hand may prove unsatisfactory to ancillary courts who may order different amounts resulting in confusion."

Mr. CROSBY.—Isn't there something further?

Mr. HENEY.—(Reading.) "As you now know from yesterday's telegrams from Lieurance to Gotthold and attorneys McManus and Ernst, receiver Lieurance and attorneys in ancillary jurisdiction intend leaving amounts of allowances to discretion of ancillary courts."

A. That is exactly what I mean and what I understood.

Q. What?

A. That the matter of the allowances of the Receiver and his attorney here in the west was to be left to the courts. The idea of that telegram was, as I understood it, to bring about a postponement of the application at New York. It was thought that the application there was for sums in excess of what those people were entitled to; and they wanted to have the matter of the allow-

(Testimony of Edward R. Eliassen.)

ances here, either by—that is, what they wanted before, either by stipulation or agreement, or order of court determining it, so as to have that information available at New York on the hearing of the application [289] of the New York people. I think that telegram, especially the latter portion, omitted from the copy of the objections we received, clearly indicates what the understanding was.

Q. Why didn't you say,—instead of saying there was an intention to appear next week up there,—which would give those people time to employ attorneys up there, the application was going to be heard to-morrow morning in San Francisco?

A. Are you referring to the telegram now?

Q. Yes.

Mr. CROSBY.—He refers to the same telegram.

Mr. HENEY.—The same telegram.

Q. Why didn't you give that information?

A. I didn't send that telegram; that is not my telegram. I saw it. Whether I saw it before or after it was sent, I don't know.

Q. You were present when Mr. Kirk dictated it?

A. That telegram?

Q. Yes. This is the one I am talking about.

A. Mr. Kirk was dictating that telegram, and there were suggestions made from time to time, and it was his handiwork.

Q. What did you understand he meant by this: "I earnestly request that question of such allowances . . . " this is from Mr. Moore, mind

(Testimony of Edward R. Eliassen.)

you,—" . . . as chairman of the creditors' committee here and as a member of the New York Committee I earnestly request that the question of such allowances be deferred for time being until receivers, attorneys and committees can exchange views and come to some agreement concerning gross amounts to be asked for."

A. Yes; I understand by that, that it was the desire of the committee here that the matter in New York be postponed until a conference could be had upon the matter pending there.

Q. By "gross amounts" you didn't understand that to include the amounts to be allowed Receiver Lieurance and yourself?

A. I understood they were elements to be considered, considering the whole. [290]

Q. They said "Until there can be a conference by which the gross amounts can be determined."

A. We had our conference, and it was iterated and reiterated that no idea on that would be suggested by the receiver or his attorney, but the matter would be left to the courts here.

Q. You didn't have any conference with the eastern creditors or, rather, representatives, other than the talk in Mr. Kirk's office, and the sending of the telegram by Mr. Moore before coming out before Judge St. Sure, did you? A. No.

Q. On the contrary you declined to intimate how much you would ask for or how much Mr. Lieurance would ask for, didn't you?

A. We didn't want to fix any amounts.

(Testimony of Edward R. Eliassen.)

Q. Wasn't it because you feared there would be opposition to the amount from the eastern creditors, if you did fix the amount?

A. I don't think so.

Q. Then I will ask you again, why didn't you notify Mr. Kirk and Mr. Moore immediately before leaving San Francisco what amount had been allowed here?

A. Perhaps we should have notified them. I know we planned to get away that night; that we had a lot of work to do; that they were interested —that was our understanding of it anyway—they were interested in knowing what the total of these allowances would be. We had a great deal to do to prepare for the hearing in the north, the first of which would be the following Monday. This application here was made on Friday, and we left on Friday night for Portland; and there was no hearing before the Monday following, which was, of course, the next week.

Q. Why didn't you telegraph Mr. Kirk or Mr. Moore from Spokane saying how much had been allowed there?

A. As I have said before, the only idea we had in mind was to inform them the amount of the net results,—the aggregate results.

Q. When you got the telegram from Mr. Kirk, in which he suggested [291] you should not apply for any allowances in the western jurisdictions in view of Mr. Fraser's telegram in the matter,—when you got that on December 15th in Seattle,

(Testimony of Edward R. Eliassen.)

why did you not wire Mr. Kirk immediately in reply, telling him that you had already done so, and what amounts you had received in San Francisco, Spokane and Seattle?

A. Well, this telegram was handed us after the train had departed, and we were very much surprised, in view of what had passed in San Francisco, to get a telegram of that kind. I assumed, I don't know what Mr. Lieurance did,—I assumed a letter had been received the day of the telegram, which led Mr. Kirk to believe it would be inadvisable to go forward with those applications; but Mr. Kirk did not in that telegram give us the contents of that letter, or state the reason; and as we were on our return down to Portland and had already visited all the courts, except the one at Portland, we concluded there was no reason why we should defer the application there, and come down here, and then go back, making a special trip for the application there.

Q. Did they have any telephone service between Portland and here at the time? A. I think so.

Q. And you could have talked to Mr. Kirk and had an understanding? A. Yes.

Q. And Mr. Moore?

A. Yes. We could have talked with them; whether we could have an understanding or not, I don't know.

Q. You were entirely indifferent as to what the creditors might feel about the amounts of the allowances? A. No, sir; I was not.

(Testimony of Edward R. Eliassen.)

Q. Immediately after the creditors,—or shortly after the creditors learned of the amounts of the allowances, a petition to set aside those matters was presented to Judge St. Sure here, wasn't it?

A. That is what you told me.

Q. And may it be stipulated that Judge St. Sure asked me if I had had any talk personally with Mr. Eliassen; that I said, I had not; [292] and that he suggested before filing it I should have a talk with Mr. Eliassen, and that I agreed to do that; that I had never been in the matter before up to that point; and that as a result of our talk with Mr. Eliassen a reduction was brought about,—by negotiations between you and myself?

A. You telephoned me, Mr. Heney, telling me what had transpired, and asked if it would be convenient for me to see you that day I immediately replied, that I would come over at once. I met you at your office, and I hadn't heard of this petition of yours, or application, until you told me of it. You stated that the Judge had suggested that you see me, and that we confer. You didn't show me a copy of the objections. You were very cordial, as you have always been with me, and you suggested that you were going to seek, or had been asked to have the orders,—or make some application to have these orders set aside. I then asked you, without knowing the contents of that petition or written objections, if you didn't feel I was entitled to something on account; and you said, "Yes; I certainly do."

(Testimony of Edward R. Eliassen.)

Mr. HENEY.—I still think so.

A. (Continuing.) And then you asked me what amount I had in mind; and I said, "Well"—I said, "I think I ought to have at least $15,000 on account at this time"; and you said, without any hesitation, "I think so, too."

I then told you that we had a stormy meeting at Mr. Kirk's office; that we wanted to act in harmony; that we went over there prepared to suggest that for the time being the figures be reduced,—the allowances be reduced on account until later, but that we could not bring up the subject; that we attempted to do it but Mr. Kirk said, "No; that time is past"; do you recollect that?

Mr. HENEY.—If you say so.

A. (Continuing.) "That time is past when we will talk of reduction. We want those matters set aside." [293]

Mr. HENEY.—I recall that.

A. (Continuing.) It was agreed upon that $15,000 would be allowed on account at an interview at your office; and you asked if I had spoken to Mr. Lieurance of it; I said, "No"; I would see him, but felt he would take the same attitude, and would get him to go over to your office. It was on leaving your office you then said to me: "Here is a copy of the objections," and handed me a copy. And I remember reading that copy going across the Bay. I was very much hurt, to be frank with you, at some of the statements made therein; but my understanding (I don't know, Mr. Heney, whether

(Testimony of Edward R. Eliassen.)

the understanding was gotten in the conversation at that time) my understanding was, that in view of the fact we were willing to agree to these reductions these objections would not be filed; and as a matter of fact—

Mr. HENEY.—They were not, were they?

Mr. CROSBY.—They are here.

The WITNESS.—They are filed here.

Mr. CROSBY.—They are reiterated.

The WITNESS.—I am very much surprised, and I feel there was a breach of our understanding. I am not saying it was an intentional breach. The understanding was it should be withdrawn and not be a matter of record.

Mr. HENEY.—These matters were filed by Mr. Townsend during my absence in Los Angeles; but I didn't understand the objections were not to be used in connection with the matter if occasion came up for them; but they were not to be filed for the purpose of getting the reduction, and they were not filed.

The WITNESS.—Not after the reduction was agreed to.

Mr. HENEY.—Certainly not.

Mr. CROSBY.—They are appended as Exhibit "A" to the objections and exceptions which you have taken to the final account and made a part of your objections and exceptions to the final account. [294]

The WITNESS.—That is contrary to the under-

(Testimony of Edward R. Eliassen.)

standing we had, that that was not to be a matter of record.

Mr. HENEY.—Well, I am sorry if it is. I would not so consider that understanding,—I mean, as precluding it from ever being used if a new situation arose which called for it. All that either of us had in mind at the time was that particular thing which was up then, whether or not we were going to have to go to court in order to secure a reduction, and if we didn't have to there would be no purpose in filing it at all; and Judge St. Sure had suggested to me, when I went there that morning and was going to file it,—I first went to him before filing it, and went into his chambers; and he at once wanted to know if I had talked with you personally. I said, "No"; and he said, "Well, won't you go and have a talk with Mr. Eliassen before you file this?" I said, "Certainly"; and then as a result of our negotiations (Mr. Lieurance came into the negotiations, too) these reductions were made.

The WITNESS.—Well, I don't want to be understood as saying the deductions were made because of anything contained in the objections, because I didn't know anything about what was in the objections until after you and I had come to an agreement. There was no coercion there as far as I was concerned.

Cross-examination by question and answer resumed by Mr. HENEY. You (Mr. Heney) told me that the creditors were objecting to the amounts;

(Testimony of Edward R. Eliassen.)

and I said I was perfect*ing* willing to agree to a reduction there, and you and I came to a very quick understanding. It was all over in a very few minutes.

Q. I was as good natured then as I have been ever since?

A. I don't want you to think from anything I have said here that I do not hold you in the highest regard. I have a very warm feeling for you and have had all the way through. You have treated me as one gentleman to another, and I appreciate it. But I do feel that exhibit in the end of those objections, which had been withdrawn, [295] and which was a thing of the past, should not have been attached, and should not be a part of this hearing here. You were in Los Angeles at the time, and I am not saying who did it.

TESTIMONY OF A. F. LIEURANCE, FOR PLAINTIFFS (RECALLED).

A. F. LIEURANCE, witness for the plaintiffs, was recalled as a witness for the plaintiffs and testified, in substance, as follows:

Direct Examination by Mr. CROSBY.

The final account and report (of the witness as Receiver) were filed in May, 1927.

At this point, counsel for plaintiffs stated that a supplemental account and report had been prepared, bringing the status of the matter down to the present time; that it was desired to file the

(Testimony of A. F. Lieurance.)

original of the supplemental account and report, and deliver a copy to counsel for the objecting creditors, so that when the matter is discussed, it will show a complete account and report.

The question of the authority of the Master to consider the supplemental report was discussed and it was stipulated by all parties that the supplemental account should be treated and considered as within the scope of the jurisdiction of the Master.

At the suggestion of the Master, the original of the supplemental account and report was filed with the Clerk of the court as a document in the case; and a copy thereof was furnished to counsel for the objecting creditors, and another copy for use in the examination before the Master.

Direct Examination of Witness LIEURANCE by Mr. CROSBY (Resumed).

That supplemental account brings the records of this proceeding down to date, showing what has been received, and what has been disbursed, by myself, belonging to this estate, and in the supplemental report, I have reported my proceedings subsequent to the filing of what was indicated heretofore as my final report. [296] Mr. Hershey has still continued to act as accountant in this matter since the filing of my original final report. He has never been discharged yet. Since the filing of my original final report, Mr. Hershey has been called upon to do whatever accounting there was to do. When we attempted to have the final hearings in the juris-

(Testimony of A. F. Lieurance.)

dictions of Eastern and Western Washington and Oregon, it was necessary for Mr. Hershey to be there on the matter. When we went into those jurisdictions, we went up there to be present at the final hearings on the final accounts and separate reports in the various jurisdictions. I took Mr. Hershey along with me, in regard to these,—supporting the account and the reports.

Q. And at that time had the objections and exceptions been filed in all of the jurisdictions, as here?

A. My understanding was they were filed at the time we got there, about that time; I don't think they were filed previously.

I don't know whether the objections and exceptions to the final account, as presented in this court had been filed here before we started North to the other jurisdictions. My impression is they had not. They were filed in the jurisdictions of Oregon and Washington,—Eastern and Western Washington, and Oregon, on the morning we appeared in court, as I understand it.

Q. In those objections and exceptions like attacks were made upon Mr. Hershey's services, were they; and payment by you to Mr. Hershey?

A. As far as I know they were.

Q. You in your report here recommend to the Court moneys in further payment, do you, to Mr. Hershey?

A. He has not been paid for his services since the filing of the final account by me.

(Testimony of A. F. Lieurance.)

Q. You feel, do you, that he would be entitled to further payment, to further compensation?

A. I think any man who does work is entitled to pay for it. The work had to be done. [297]

(At this point it was announced that the original supplemental account now bore a file-mark upon it; and it was stipulated that the questions propounded to the witness, and the answers given thereto, should be deemed and considered as if said supplemental account had already borne the filing mark of the Clerk.)

TESTIMONY OF PHILLIP A. HERSHEY, FOR PLAINTIFFS (RECALLED).

PHILLIP A. HERSHEY, recalled as a witness for the plaintiffs, testified, in substance as follows:

Direct Examination by Mr. CROSBY.

Since the filing of the final account and report of the Receivers sometime in May of this year, I have done such other work for Mr. Lieurance as Receiver, and under his direction, as I was called upon to do.

I believe there was a report to Mr. Gotthold. Mr. Gotthold requested a report of some transactions. That report was made for Mr. Gotthold at the request of Mr. Lieurance.

I have also been called upon,—called into conferences on numerous occasions between Mr. Lieurance and Mr. Eliassen, his attorney, and at times by Mr. Lieurance alone.

(Testimony of Phillip A. Hershey.)

I also prepared for this court the supplementary final account, so designated, which is now filed here.

Acting under the instructions of Mr. Lieurance I accompanied Mr. Lieurance and Mr. Eliassen to Spokane, Seattle and Portland, and was absent approximately two weeks on that work.

I attended these hearings here at the request and under the instructions of Mr. Lieurance, the Receiver; and, I don't know whether it is any part of the record or not, but I was on my way to be very frank, I was in the middle of a vacation, and at the close of the vacation I was going to Cleveland, Ohio; at that time I was in Atlanta, Ohio, and my plans called for me to go to Cleveland, Ohio, where I have some work to be done, and it will necessitate my return to Cleveland, Ohio, at higher railroad rates, due to the fact that the summer [298] excursions are no more, and I don't know whether it should have any bearing or not; if it should not have I won't ask for it.

Q. Exclusive of that situation, what do you think would be a fair compensation to you for the services necessarily rendered by you to Mr. Lieurance, in connection with this business, since the filing of the final account and report herein?

A. I am perfectly content to leave it to the discretion of the Master in this case. A statement of the services rendered had been filed, and I am content to leave it to his discretion.

(Attention was then directed to the fact that the supplemental account of the Receivers which had

been filed, included a statement of the services rendered by Mr. Hershey.)

Witness Interrogated by the MASTER.

This (statement of the services of Mr. Hershey, appended to the supplemental account of the Receivers, above mentioned, bears my signature; and the facts stated therein are true.

Cross-examination by Mr. HENEY.

Q. Mr. Hershey, you say here,—"Auditing all receipts and disbursements, May 1st, 1927, to October 15th, 1927, inclusive." What were the receipts and disbursements,—do they show here?

A. Yes; they show as page 1 of the supplemental account.

The MASTER.—The receipts do?

A. Yes.

Q. And disbursements. A. Page 2, 3 and 4.

Mr. HENEY.—Q. What do you mean by "Auditing the receipts"?

A. I mean to say I checked the interest, to see that the interest credit was proper and had been credited to the account of the Receiver at the bank, and that his bank balance, as stated here, was correct.

Q. You would not say that it took an expert accountant of your standing to do that, would you?

A. I would say I was acting under the instructions of the Receiver to do that, Mr. Heney.

Q. Do you think that Mr. Lieurance is not competent to do that himself?

(Testimony of Phillip A. Hershey.)

A. I have no doubt about the ability of Mr. Lieurance. [299]

Q. Or that he could do it himself?

A. That would be a conclusion of his own ability by myself of a certain nature, and I cannot state it. He probably could. I think due to the trouble that has arisen in this matter he thought it was proper—

Mr. HENEY.—As to what he felt you can't possibly know that.

A. What?

Mr. HENEY.—As to what he felt you can't possibly know that, except by his telling you, and that would be hearsay; so we will omit it.

A. I think that is right.

The receipts that I audited all appear on the first page; and the disbursements which I audited appear on the other pages.

Mr. Lieurance, the Receiver, made the disbursements, by check.

Q. And you wanted to see if he made any mistakes or not; is that the idea?

A. To verify the correctness of his statements to the Court.

The total amount involved in these receipts, since the final account, is $632.79. The total amount of the disbursements is $3,913.31, which includes a Master's fee of $1,000, leaving $2,913.31.

The item "Southern Pacific Railroad Company, transportation $228," on page 3, is for transportation purchased on July 20, for Mr. Eliassen, Mr.

(Testimony of Phillip A. Hershey.)

Lieurance and myself, to Portland, Spokane, Seattle and return, to attend the hearings upon the final account.

The item of July 25 "Portland Hotel, travel expense, $200.44, covers the hotel expenses for the three of us, and Pullman accommodations, etc., which were ordered at the hotel to Spokane; just the Pullman accommodations; I cannot state the amount paid for the Pullman accommodations right off-hand.

We were at the Portland Hotel five or six days; I can't tell definitely, because we left in the morning or evening,—I don't know which; we were there five or six days; I believe it was five days. [300]

We had two rooms, twin beds in one room and a single bed in the other. Mr. Eliassen occupied the single room; and Mr. Lieurance and myself occupied the double room. I can't recall the rate for the rooms, from my memory.

Q. Have you a voucher here?

A. Just a duplicate remittance advice. I don't know whether the complete voucher is here or not. We were going to file it with the account. I am going to gather them and file them all here.

We have a bill from the hotel; I believe there were cash transactions also. By cash transactions, I mean that we had to pay for meals on the train; we paid for some meals outside of the hotel, in Portland, I believe; I shall have to refer to the record on that. There is also included in that bill

(Testimony of Phillip A. Hershey.)

at the Portland Hotel a charge for a stenographer for some legal papers which Mr. Eliassen had to prepare for the Court in Portland at that time.

Referring to the item, "Davenport Hotel, Spokane traveling expenses $47.76"; we were there one day; and they secured the Pullman accommodations to Seattle for us. That includes the Pullman accommodations; the hotel ordered them, and we paid for them. We did not have any drawing room; we had three lowers, I believe.

Referring to the item, "Olympic Hotel, Seattle, $209.28"; we were in Seattle six days. The law and motion day was separated by one week as I understand it; you know more about that than I do. The Olympic Hotel bill above mentioned (which also includes an item of $43.70, making a total of practically $253) includes the Pullman fare, back to Oakland.

Q. You feel quite sure of that?

The MASTER.—To Portland.

The next item, "Southern Pacific Railroad, $256.16," was in payment for round trip ticket, including Pullman for Mr. Eliassen to New York and return.

The item, "August 4th, A. F. Lieurance, advance traveling expenses, $62.30," was paid to Mr. Lieurance for sums expended on [301] trip above mentioned; for meals and some of the miscellaneous expenses.

Q. On the Southern trip? A. Yes, sir.

Q. From the North?

(Testimony of Phillip A. Hershey.)

A. Yes, sir; we had to eat on the way back. We also had to pay for hauling quite a few records.

Q. You didn't eat $62 worth on the way back, I hope.

A. I can't state as to that. I will look up the detail of it for you.

I think those expenditures are all in proper order. The vouchers representing the amounts are not on file; we are filing them here later on; I think I can have them here tomorrow.

TESTIMONY OF A. F. LIEURANCE, FOR PLAINTIFFS (RECALLED).

A. F. LIEURANCE, recalled as a witness for the plaintiffs, testified, in substance, as follows:

Direct Examination by Mr. CROSBY.

My business is that of a merchant; that has always been my occupation,—or nearly always. I have been engaged continuously in the merchandising business since 1911, except about a year and a half, until about 1925. Even before that,—I began in the merchandising business when I was about fifteen years old. My introduction into the business was as a clerk. I am 45 years old.

When I first began in the merchandising business I began as what is commonly known as a clerk in a country store, and in two stores I worked for the next seven years; two stores I worked in I acted in that capacity,—for the next seven years.

(Testimony of A. F. Lieurance.)

In 1911 I became engaged in the chain store business, and have been in it ever since,—with J. C. Penney Co. Its main office is at New York City; and its chain stores extend over the whole of the United States. When I severed my connection with the company, it had approximately 750 stores.

I served in a good many capacities while I was with the Penney chain stores organization. I have been store manager for some [302] three years; a local buyer; and previous to that I was salesman in a store for a couple of years. Then I was buyer of merchandise, that is, a resident buyer in New York for about two and a half years. Then I was the advertising director of that business, and also—

Q. For the whole business?

A. Absolutely; also had charge of the personnel and the sales department of those stores; they weren't 750 at the time; there was, if I remember correctly, 497 at the time I was handling the advertising; and I had charge of the personnel of those stores; and later traveled quite a lot and for almost two years in the interest of building the organization among the men in the institution, throughout the country. I served on the board of directors for two years.

In 1926, I started a store of my own at Ukiah, California, and was planning to start some more. I had other business interests which were alive and moving during the year 1926. I had considerable interest in the Penney Co., and have yet. I looked

(Testimony of A. F. Lieurance.)

after and I have a pretty good-sized ranch in Sacramento Valley; that I look after yet. I have other affairs I have to attend to, personal affairs.

When I first heard of my having been selected or mentioned as a Receiver of this Pilcher Co. matter, I was living in Oakland. I received the information from McManus, Ernst & Ernst, attorneys in New York. I had known Pilcher, and knew that such a chain of stores existed; this was the first that I knew of its being in financial difficulties.

I say that McManus, Ernst & Ernst first communicated with me in relation to this matter. They did not at that time advise me of the nature and extent of the chain store business of the Pilcher Co.; they simply notified me by telegram that I had been appointed a Receiver for the R. A. Pilcher Co. That was the first intimation I had that the Pilcher Co. was in trouble.

Q. You proceeded then, did you to learn the nature and extent of the Pilcher Co. and its business? [303]

A. I knew something about the nature and extent of the business, I won't say all about it, but considerable about the nature of the business; and I knew in a general way the extent of the business, because I have known Mr. Pilcher.

With the understanding that those stores were classed as general merchandise stores and their stocks were made up of overcoats, men's ready to wear clothing, men's furnishing goods, ladies' and

(Testimony of A. F. Lieurance.)

children's clothing, hats and caps and other lines usually found in department stores; the type of merchandise which entered into the activities of the Penny Company with which I was connected, was identically the same.

After receiving this notice of my appointment or selection, I had a conference with an attorney, Mr. Eliassen, as to what were the duties of a Receiver. I had to learn what they were; and I conferred with Mr. Eliassen, and he is my present attorney in this matter.

I answered the Ernst communication. I also had a telephone call from Mr. Walton N. Moore, of San Francisco, in regard to this receivership. He is one of the objectors here; he is a member of the Western Creditors' Committee,—so I was later informed; I don't know whether he was a member of the eastern Creditors' Committee. I first received my communication from Walton N. Moore at my home in Oakland. I assume he was in San Francisco, from the nature of the conversation; he asked me to come over and see him; I took it for granted that he was in San Francisco at the time.

I met him in San Francisco; subsequently I met him in Piedmont in his home.

Up to that time, I didn't know anything about the plan or purpose of the creditors, in relation to this proceeding, except that I had been appointed Receiver; and Mr. Moore told me he had talked over the telephone with some in New York,—Mr. Fraser, I believe,—and that the Pilcher Co.

(Testimony of A. F. Lieurance.)

was in trouble; and other than that he knew very little about the nature of the trouble. [304]

I received a communication from McManus, Ernst & Ernst by letter, concerning a certain creditors' meeting in New York which had in prospect an extension of time to the Pilcher Co., in order for it to try to refinance itself, or to re-establish itself as a going institution. I have that letter here. This was in response to my communication with McManus, Ernst & Ernst, asking them what the nature of this receivership was, and what was proposed,—what they proposed to do; and just what I was expected to do.

I think I got some of the printed communications afterwards; I think I have it here.

Q. In your communication with Mr. Moore, was anything said by him or you with regard to your connecting yourself or associating yourself with the San Francisco Board of Trade, in your capacity as Receiver here?

A. There was at Mr. Moore's home in Piedmont the evening after we had the meeting in San Francisco in the afternoon.

Q. What was that?

A. Well, Mr. Moore suggested that—he insisted that I accept the receivership, and had recommended me very highly and could not think of a better man, and other remarks along that line, and prophesied that there would be trouble in refinancing the business, and suggested that I take the receivership,

(Testimony of A. F. Lieurance.)

and thought the San Francisco Board of Trade was the logical institution for the handling of that business; and, in fact, they were the general recognized agency for that purpose; they had the machinery and equipment and all that sort of thing, and he asked me to go over and start housekeeping there and go ahead with the receivership.

Mr. Moore also spoke to me as to the selection of counsel by myself. He suggested that I use the attorneys employed by the Board of Trade. I did not give him any immediate answer to that.

Q. Did you subsequently make your views known to him on that or those subjects?

A. I told him that I had conferred with Mr. Eliassen regarding the [305] duties of a Receiver; that this was a new business to me; I knew nothing about the receivership business. I did know about the merchandise and had conferred with Mr. Eliassen, but I could not or would not accede to his demand to go and use the attorneys of the Board of Trade, until after I had thought the matter over; and I did subsequently decline to do that.

Q. You thought, having been appointed and assuming the responsibilty, you wanted, and very naturally, to use your best judgment in the management of this business? A. Yes, sir; I did.

Mr. HENEY.—Let him do the testifying now.

Mr. CROSBY.—All right; perhaps we had better adjourn.

Adjournment was then taken until the next day.

(Testimony of A. F. Lieurance.)

Direct Examination of A. F. LIEURANCE by Mr. CROSBY (Resumed).

I have made a thorough search of my records, for the telegram from myself to my stenographer in relation to the sending of a wire on to New York requested by Mr. Heney.

The stenographer who was then in my employ ceased to be in my employ on July 15 of this year. She is in Oklahoma or she was the last I heard of her.

(Questioned by Mr. HENEY.)

Q. In other words, you (did not) find it?

A. I didn't find it yet, I am still looking. I imagine it could be gotten from the telegraph office in the event it was sent by the Western Union. I don't know. There is a possibility it might have been with some other communication.

(Attention was then directed to the telegram dated December 10, 1926, from A. F. Lieurance to A. F. Gotthold, which had theretofore been read into the record; and Mr. Crosby made the following statement concerning it:)

While on this matter of the telegram, I wish to have the record show that, among other things, it stated: "It has been suggested here and evidently at New York also that you receive your [306] compensation in parent jurisdiction and I look to courts in ancillary jurisdiction for my compensation. Stop. There is no doubt this will simplify matters and keep aggregate amount to be allowed

(Testimony of A. F. Lieurance.)

down to reasonable figure as suggested at yesterday's meeting. However, no one can foretell how this will work out. Please let me have your views regarding this arrangement. Application for orders to pay forty per cent dividend and allowances on account will be made in North next week."

Direct Examination of the Witness LIEURANCE by Mr. CROSBY (Resumed).

Under date of December 15, I received a telegram from Mr. Gotthold relating to that part of my telegram to him of December 10, having to do with the suggestion as to the division of those fees. The document just shown to me is either the original or a copy of that telegram; I judge that it is the original; I suppose that I received it on December 15, 1926; it is dated on that day.

(Thereupon Mr. Crosby offered the telegram of December 15, 1926, above mentioned in evidence; attention was directed to the fact that it had already been introduced in evidence and read into the record; but counsel for plaintiffs again read the telegram into the record. It will not be repeated here.)

There were further communications between myself and Mr. Gotthold in relation to that subject; there was considerable communication in regard to it,—that is, with relation to the division of the fees. Those communications are in this file; I will have to look through it to get it.

I replied to the wire from Mr. Gotthold dated December 15, 1926. I replied on the same day. I have a copy of that reply here.

(Testimony of A. F. Lieurance.)

(Thereupon counsel for plaintiffs read into the record the telegram dated December 15, 1926, from A. F. Lieurance to Arthur F. Gotthold; and which telegram had theretofore been introduced in evidence and read into the record and therefore will not be repeated here.) [307]

I received a reply to that telegram, and have it here.

(Thereupon, counsel for plaintiffs read into the record the telegram dated December 16, 1926, from Arthur F. Gotthold to A. F. Lieurance; which telegram had theretofore been introduced in evidence and read into the record and therefore will not be repeated here.)

I replied to the telegram last referred to; and here is the reply.

(Counsel for plaintiffs then read into the record the telegram dated December 20, 1926, from A. F. Lieurance to Arthur F. Gotthold; which telegram had theretofore been introduced in evidence and read into the record, and therefore will not be repeated here.)

(The telegram above mentioned as having been previously introduced and read into the record were introduced and read into the record during the cross-examination of the witness Edward R. Eliassen.)

Direct Examination of A. F. LIEURANCE by Mr. CROSBY (Resumed).

I remember the telegram referred to yesterday,

(Testimony of A. F. Lieurance.)

from Mr. Kirk to myself and Mr. Eliassen which found us on board a train and which read as follows:

> "In view of the communication received by Walton N. Moore from Fraser, Chairman New York Creditors Committee, it is highly desirable that you should not apply for receiver's allowances or attorney's fees in Western jurisdictions until whole subject-matter can be again discussed here upon your return."

At that time, no communication from Fraser had been made known to me,—that is so far as its substance was concerned. We had not known of any communication from Fraser other than this reference to such communication in the telegram from Mr. Kirk above quoted.

Q. Yesterday when we adjourned some references were being made to your communications with Mr. Moore, of the Board of Trade of San Francisco. At the time that you were in conference with Mr. Moore, [308] had you learned from him what, if any, relationship he, personally, bore to the Board of Trade of San Francisco.

A. I think Mr. Moore told me that he was the Chairman of the Board of Trade, or had been the Chairman. I am not positive just what connection he had. If I remember correctly it was that he was the Chairman of the Board of Trade.

When I employed Mr. Eliassen I obtained offices in Oakland, in the Central Bank Building on the 12th floor, adjoining Mr. Eliassen's. During all of

(Testimony of A. F. Lieurance.)

the period of this receivership, my home was in Oakland.

Q. In selecting your office and making arrangements for payment of rent, upon what terms did you get that office and its use?

A. We got two small rooms, for which we paid $90.50 a month. We were informed by the agents for the lessor that their purpose was to lease these rooms for a period of years. They were loath to let us have the rooms unless we would take a lease on them. However, after explaining the situation and advising them that it was necessary that we be in close proximity to Mr. Eliassen in order to facilitate the handling of this business, they consented that we might have the rooms on a monthly rental basis.

Q. Was that any greater than their lease?

A. No.

I have communications from McManus, Ernst & Ernst, with relation to the purpose of the receivership, from it inception. This correspondence, in order to build up the whole of the communications that have passed, would have to begin at the beginning, where I wired McManus, Ernst & Ernst on June 3d.

I have in my possession a copy of the wire sent by myself to McManus, Ernst & Ernst on or about June 3, 1926, in relation to this matter.

(Thereupon, counsel for the plaintiffs offered the telegram last mentioned in evidence, being dated

(Testimony of A. F. Lieurance.)

June 3, 1926, signed by A. F. Lieurance and addressed to McManus, Ernst & Ernst, 170 Broadway, New York City, and which telegram was read into the record, as follows:) [309]

> "Wire received announcing my appointment with Arthur H. Gotthold as receiver of R. A. Pilcher Co. Inc. Stop. Will take possession Western stores as directed and do what I can to prevent attachments. Stop. Please wire me who you represent and cause to be sent me 16 certified copies of order making appointment. Stop. Also list of assets and schedule of liabilities, giving names and addresses in full of all creditors. Have papers sent Air Mail and wire me information in premises stating also where it is desired I shall present bond and qualify. Desire to know also by wire if all accounts of receivers shall be joint, or whether Gotthold shall act in the East and I shall have exclusive charge as receiver in States of California, Oregon, and Washington."

(Thereupon the witness identified, and counsel for plaintiffs introduced in evidence and read into the record, the following telegrams which passed between A. F. Lieurance and McManus, Ernst & Ernst:)

"New York, N. Y. 9:59 A June 4, 1926.

"A. F. Lieurance, Oakland, California, 1092 Grand.

"We represent Creditors Committee and complainants in equity suit and order will be rendered

here today authorizing us represent receivers. Will send you by air mail sixteen certified copies order. Will mail you earliest possible date names and addresses of all creditors and statements of assets. Stop. Send individual bond to us air mail for filing here. Stop. Acts of receivers shall be joint. Will wire further instructions later in the day.

McMANUS, ERNST & ERNST."

"June 4, 1926.

"McManus, Ernst & Ernst, 170 Broadway, New York City, N. Y.

"Wire received. Stop. As site of operation is here on coast it is necessary for me to select my own counsel, and I have selected Edward R. Eliassen, Central Bank Building, Oakland, California, as my attorney. To save expense and avoid loss of time and the other complications that will arise as result of joint control I suggest that complete control be granted me for Oregon, Washington and California. This procedure is approved by some Western Creditors, and I feel will meet with approval of all creditors. I am writing you fully in this regard. I am also communicating with Judge Hand in the premises.

A. F. LIEURANCE."

"New York, N. Y. 6:26 p. June 4, 1926.

"A. F. Lieurance, 1092 Grand Avenue, Oakland, California.

"We urged your appointment of receiver at suggestion of Creditors Committee to secure complete

co-operation with Eastern Creditors. Stop. Executive office and chairman and secretary of Creditors Committee here and we are attending to mailing copy of order of receiver to each creditor. Also notice required by Judge Hand, copy of creditor's agreement and letter from Creditors' Committee. There [310] are also judgments and attachments here and we can be of best service as attorneys for both receivers. It is quite proper you have your local attorney act in West and you take charge of Western situation and communicate immediately with various managers and guide them in their duty. While control should be joint, receiver here will not interfere with your control in West. Suggest you confer with Walton N. Moore, who wishes to be of help through San Francisco Board of Trade, and also A. V. Love, of Seattle, with relation to purchasing merchandise for stores, and further suggestion that you and Arthur H. Gotthold be made ancillary receivers in Oregon, Washington and California. This is desire of New York members Creditors Committee.

McMANUS, ERNST & ERNST."

"June 4, 1926.

"McManus, Ernst & Ernst, 170 Broadway, New York City N. Y.

"We have this day forwarded by air mail bond of A. F. Lieurance as receiver of R. A. Pilcher Co. Inc. Edward R. Eliassen, as Attorney for A. F. Lieurance."

"June 5, 1926.

A. F. Lieurance, Oakland, California, 3840 Grant Avenue.

"Receiving daily many telegrams from managers stores about attachments. Will you communicate with store managers and see what arrangements can be made to have attachments listed. Stop. If attachments troublesome will arrange file bankruptcy petition here and have Gotthold and you appointed receivers. Letter follows.

McMANUS, ERNST & ERNST."

"June 5, 1926.

McManus, Ernst & Ernst, 170 Broadway, New York City, N. Y.

Have taken possession of all stores by wire and given instructions to store managers pursuant to directions already received from you. Stop. Advise me if it is desire of Creditors Committee to have business continued with a view toward its building up or am I merely to take charge with a view toward immediate liquidation. Stop. Have talked with Walton N. Moore, and am communicating with A. V. Love by letter. Stop. Will take whatever action is necessary when I know definitely what the committee wants done.

A. F. LIEURANCE."

(Testimony of A. F. Lieurance.)

Direct Examination of Witness LIEURANCE (Continued).

In answer to the above telegram, I received a letter from McManus, Ernst & Ernst, dated June 5, 1926. It is quite a lengthy letter; there are just a few paragraphs in it that just touch on this.

(Thereupon, counsel for plaintiffs introduced in evidence, and read into the record, certain portions of the letter last referred to, as follows:) [311]

"A meeting of the creditors of R. A. Pilcher & Co. Inc. was had on May 28th. That meeting was largely attended, and resolutions were unanimously approved appointing a Creditors' Committee, and granting the debtor corporation an extension of one year. The Creditors Committee selected at that meeting is composed of:

A. V. Love, President, A. V. Love Dry Goods Co., Seattle, Washington.

Walton N. Moore, President, Walton N. Moore Dry goods Co., San Francisco, California.

J. Von Dohln, of Hess Goldsmith Co., New York City, N. Y.

George G. Black, President Black Manufacturing Co., Seattle, Washington.

William Fraser, President, New York Credit Men's Association, New York City.

Mr. Black has advised the committee he refuses to act, and Mr. William Schmidt, of the International Shoe Company, has been selected in his place. The Creditors' Committee selected me as its counsel. Settlement agreements were imme-

diately prepared by me in conjunction with counsel for Pilcher Co. Inc. and the closest co-operation existed and still exists between the Creditors' Committee, R. A. Pilcher Co. Inc., and myself. It was the plan to use the money on deposit in New York to pay an immediate 10 per cent. cash dividend when the creditors' agreement was declared operative. Although the banks hold obligations against the debtor corporation arrangements were made that the banks would not offset these obligations against the cash balances, so that the money could be used. Of course, if the receivership is not listed, the banks will use all of the cash on hand and apply it on account of the obligations of the debtor corporation, which amount at this time to about $135,000.

After the committee was organized a number of small creditors here persisted in entering judgments in actions brought against the Pilcher Company, to which there was no defense, and the creditors in the West started to attach. The Creditors' Committee felt that it would be unequitable to permit any preferences, and would only encourage other small creditors to begin suit for attachments, and with the consent and co-operation of the Pilcher Company a suit in equity was started by me and at the request of the Creditors' Committee I submitted your name as one of the receivers. Judge Hand adopted my suggestion and you and Arthur F. Gotthold, who was selected by Judge Hand, were appointed receivers.

In order to prevent unusual expense it is the hope that you and Mr. Gotthold will be appointed ancillary receivers in each jurisdiction where there are assets of the Pilcher Co. One receiver in the East and one in the West would be cumbersome. There is no desire on the part of Mr. Gotthold to interfere with your management and control of the Western situation. On the contrary, he wishes to be helpful to you in that situation, but for purposes of co-operation and contact, the members of the Creditors' Committee in the East desire you and Mr. Gotthold to be co-receivers in every jurisdiction.

Mr. Gotthold has already arranged to borrow money on receivers' certificates for the purpose of buying additional merchandise to balance the stock at the various stores. Mr. Love and Mr. Moore will co-operate with you in carrying out this program, and also in determining what merchandise should be purchased. Of course, it will be necessary that the assets of the Pilcher Company in every jurisdiction be pledged as security for the payment of the receivers' certificates. Mr. Gotthold will not be able to borrow money on receivers' certificates here if he is not co-receiver with you in the Western jurisdictions, and it will be necessary for orders to be [312] entered in the Western jurisdictions permitting the assets to be pledged. You will, therefore, appreciate how important and necessary it is that there be complete co-operation between you and Mr. Gotthold as receivers in this situation. Otherwise, there will be great confusion and small hope of reorganization.

(Testimony of A. F. Lieurance.)

Unfortunately, many of the Western creditors have levied attachments. The suit in equity will serve only to stay these suits, but will not dissolve them, and unless the attachment creditors will come into the plan of reorganization it will be necessary to file a petition in bankruptcy. This, of course, will dissolve the attachments.

On behalf of the New York receiver I have not instructed the managers of the stores in the West. That matter has been left entirely to you.

I will send you by air mail on Monday copies of the bill of complaint and the answer in the equity suit here, so as to assist you in bringing ancillary proceedings.

I beg to remain,

Very truly yours,
IRVING L. ERNST."

Direct Examination of Witness LIEURANCE (Continued).

I replied to the foregoing letter, and I have my reply to that letter.

I received a copy of the Creditors' Agreement in this matter. I don't know just what time it was received. It was some time after these letters were received. It came together with the sixteen copies referred to. (Copy of the Creditors' Agreement referred to is produced.) I received that from McManus, Ernst & Ernst; but it never became effective; the creditors did not all sign up.

(Testimony of A. F. Lieurance.)

Mr. HENEY.—The point is that they proceeded running the business on the theory that they were trying to have this signed up. That is the point about it.

Mr. CROSBY.—This is merely an incident. It never ripened into a reality.

Mr. HENEY.—No, but it shows the intention of the parties at the time.

(The copy of the Creditors' Agreement above mentioned was introduced in evidence, and marked Receivers' Exhibit No. 8.)

I was first appointed as temporary Receiver. Approximately [313] a month elapsed between the time of my appointment as temporary Receiver and my appointment as permanent Receiver; it might be a few days over a month.

(Counsel for the objecting creditors interrupted the examination, and stated in the record, that the statement by counsel for the plaintiffs to the effect that the Creditors' Agreement above mentioned was not "signed up" should be qualified in the following respect: That "it was partially signed up," but they did not succeed in getting all the creditors in, and therefore the matter proceeded under the receivership.)

Direct Examination of Witness LIEURANCE (Continued).

Q. What did you find the situation to be in regard to suits and attachments that were in being

(Testimony of A. F. Lieurance.)

against this company when you undertook this receivership?

A. There had been an attachment or two filed in California prior to the receivership, that is, they took precedence over the receivership. There might have been three. I don't remember just the number. There were quite a number of threats; a great many people who were creditors were anxious to find out about the condition of their bills, and but for a restraining order I imagine they would (have) filed suit.

I selected Mr. Hershey as an accountant, and he was approved by the courts in the four jurisdictions here in the West.

(Interrogated by the MASTER.)

Q. Do you mean by an order entered to that effect?

A. I don't understand it well enough to know that. The action that was taken was this: I selected Mr. Hershey and his name appears in the application to the Court.

(Direct Examination by Mr. CROSBY (Resumed).

I communicated with the store managers. The first communication was by wire, informing them of my appointment as Receiver. As soon as the receivership was perfected here in the California [314] jurisdiction we proceeded to Oregon and Washington, that is, eastern and western Washington, for the same purpose. While up there I

(Testimony of A. F. Lieurance.)

called on the managers of the stores, I mean I called the managers of the stores together at Portland, Oregon, for a conference, and to instruct them in their duties and the conduct of the business under the receivership. In other words, we had a convention up there at the Portland Hotel in Oregon.

Q. Did you communicate thereafter with the store managers, by communications, in which you gave them definite instructions as to what they were to do?

A. I communicated with them by issuing bulletins, which is one of the best means of conducting a chain store business, and also by personal letters in regard to matters that pertained to the individual stores. Where the stores were involved collectively, they were instructed by bulletins. Of course, when I came into personal contact with the managers we went over the matters.

There is here a copy of a questionaire that was sent to each of the stores that I might get a better mental picture of the condition that obtained in each of the individual towns and in each of the individual stores. Then there are bulletins of special instructions.

The questionaire which I sent out to these various managers were all answered, and they came back to me and I checked them.

(Counsel for plaintiffs offered in evidence the first letter with the questionaire; and before this

offer was acted upon, the following discussion and statements by and between counsel took place:)

Mr. HENEY.—I will say now that I have not any doubt about the competency of Mr. Lieurance in managing that business.

Mr. CROSBY.—Will you concede that Mr. Lieurance, as Receiver, here, has given detailed and all reasonably necessary attention to the duties devolving upon him in this receivership, and in the management [315] and conduct of the stores, and in relation to all matters in his receivership here?

Mr. HENEY.—I am not quite certain from hearing that whether it would include the question whether or not he was extravagant in the conduct of it.

Mr. CROSBY.—If it is agreeable to you, you may withhold any concession on the question of extravagance and you may challenge it, if you desire, in the proceedings here. We are ready to meet it. If you will make the other stipulation it will save us a lot of time in presenting this detail. If you wish to challenge his extravagance, you can withhold that now from the stipulation.

Mr. HENEY.—I am willing to admit that he conducted it very efficiently.

Mr. CROSBY.—That is, throughout the sales, as well as the conduct of the business, and clear to the end of his service?

Mr. HENEY.—You mean the bulk sales?

Mr. CROSBY.—The bulk sales, and the individual sales over the country, and in all of the work

(Testimony of A. F. Lieurance.)

having to do with the conduct of the business. We will ask you to concede that he performed that service efficiently, and conscientiously, and economically.

Mr. HENEY.—I won't do that. I will concede that he performed it efficiently.

(Whereupon, the questionaires above referred to were introduced and received in evidence, and were collectively marked as Receiver's Exhibit 9.)

Direct Examination of Witness LIEURANCE by Mr. CROSBY (Resumed).

When I concluded to sell the stores, I made up data in the way of information to prospective purchasers regarding them. I made up a complete statement of all the information which I could possibly get. I sent it to all prospective purchasers that made inquiry about the business; I sent them to a number of people whom I know in the merchandise business and who might have been interested in [316] acquiring this property. I sent out 100 copies. The persons to whom I sent these statements were located west of the Mississippi River. They are people engaged in the same class of business. I know these people.

The document just shown to me, marked "Office A. F. Lieurance and Arthur F. Gotthold, joint receivers R. A. Pilcher Co., 1201 Central Bank Bldg., Oakland, California," is a copy of the data that I assembled and sent to the prospective purchasers that I have referred to. It contains the conditions

(Testimony of A. F. Lieurance.)

of the sale and information regarding stores and stocks.

(The document just identified was then offered in evidence by the plaintiffs, and was received without objection and marked Receiver's Exhibit 10.)

Before preparing and assembling that information and sending it out, I had personally investigated the conditions of the stores, and their status.

There is set forth in the statement filed by myself here, the aggregate claims, and the amount that I reduced by adjustment, and the number of preferred claims; also the net cash received by me from the sales of the stores.

I made a thorough investigation of the leases upon which the Pilcher Company had obligated itself in relation to those various stores. I procured the leases, and made a list of the conditions of each of these leases, or I caused it to be made.

Q. I show you this document marked "Pilcher Co., Roseburg, Oregon, lease," and ask you to state whether or not you have therein set forth a transcript of the leases, in regard to their terms, and their obligations, etc.?

A. Yes. The individual leases are set forth here. However, a copy of the compilation and the results is not attached to this copy. There is a recapitulation of all of those and the amounts involved.

Mr. HENEY.—Mr. Crosby, will you ask him whether he did that, [317] or whether his attorney did it?

(Testimony of A. F. Lieurance.)

A. (Continuing.) I caused it to be done.

Q. Mr. Lieurance, did you, yourself, individually keep in touch with and obtain and have in your mind information in relation to all matters pertaining to this receivership, here, in your jurisdiction?

A. I obtained the leases and had Mr. Eliassen go over them for the purpose of determining the status of those leases, the contracts, etc., and what they involved.

I personally learned what the status of those leases was in each instance. The information is contained in the letter of instructions to buyers, or in the letter of information to buyers.

Q. Now, Mr. Lieurance, let us have this understood. I want to know whether or not you submitted matters such as those leases, or any other matters, to any of those who were in your employ, whether it be your attorney, or anyone else, and then ignore the result of their observations or investigations?

A. I don't think I have ignored anything; if I have I don't know it.

Q. Then all information gained for you directly, or for you through those associating with you, you received that information from them all: Is that correct? A. Yes, I did.

The MASTER.—Do you offer this document?

Mr. CROSBY.—Yes. That is to show the general value of the leases in question here.

Mr. HENEY.—We conceded that when we con-

(Testimony of A. F. Lieurance.)

ceded his efficiency. We don't think he would ask his attorney for information about those leases and then never get the information from his attorney.

Mr. CROSBY.—I just want to have it understood that he kept directly in touch with this whole business from start to finish.

Mr. HENEY.—I haven't any doubt of that.

The MASTER.—I will receive it, and it will be marked Receiver's Exhibit 11." [318]

Direct Examination of Witness LIEURANCE by Mr. CROSBY (Continued).

I had an aggregate of the financial obligations, under the leases, compiled by the accountant, and I have figured it, myself, several times. I don't recall the exact figure which it reached; but it is nearly a million and a quarter dollars,—that is the unearned value of the contracts. I think that in carrying on this business in these various stores as a going concern, that assisted me in relieving the estate of the obligations of the leases.

Q. In what respect?

A. Some of the leases were made for a period of three years, and others up to as high as twenty years, and the landlords were, of course, interested in keeping their buildings occupied and having tenants for them, and since the business had gone into the hands of receivers there was every likelihood, in their minds, that it would be closed out soon. I could not give them any definite information as to whether it would be closed out or whether

(Testimony of A. F. Lieurance.)

it would be rehabilitated and carried on, but I did inform them that every effort was made, or, rather, that every effort would be made, if the business had to be closed up, to procure desirable tenants for them, or to interest people in the property who wanted to carry on the business, and we succeeded in doing that. As a result, there were no claims filed against the leases.

I mean there were no claims filed against the estate for the unearned portion of the lease contracts.

To the best of my knowledge, the statements contained in the statement which I have filed here, are correct. The statement, as you know, was not prepared for filing; it was a statement prepared for your benefit, and information, and mine. We filed it here. It has not been given all the attention that it might have been given if it had been prepared for filing. It is true.

I have received letters from creditors relating to my conduct of this business and the matter of my compensation. [319]

(Mr. Crosby stated that the letters referred to had been filed in the case; and stated that he desired to offer those letters in evidence.)

(Interrogated by the MASTER.)

The amount of the claims upon which dividends have been paid is approximately $724,000. The original claims were $747,000, and they were reduced to $724,000; that is, they were reduced through adjustment, and through negotiations with

(Testimony of A. F. Lieurance.)

the claimants. That includes preferred claims and everything. There were not many preferred claims, only approximately about $5,000. There were many claims filed as preferred claims but that is all that was allowed. The 40% dividend was paid on $719,000 because the preferred claims built up the $724,000.

Direct Examination by Mr. CROSBY (Resumed).

Then there was an additional dividend of 10%, making an aggregate of 50%. There has been 50% paid on the general claims. The preferred claims were settled before the Master.

Q. Were the Receivers' certificates all settled, all paid?

A. Absolutely every dollar has been paid. We bought $100,000 worth of merchandise. That was paid for. Everything has been paid. Court costs have been paid. So far as I know there is not one nickel remaining unpaid.

I bought $100,000 worth of merchandise in the conduct of the business, and to keep the stores replenished. I gave personal attention to the matter of balancing the stock in the various stores.

When we took the inventory, there were some very undesirable features from a merchandising standpoint. The inventory involved at cost just a little less than $600,000—$599,717, or approximately that amount. That was at the original cost of the merchandise. I might state that a liberal portion of that was bought at pretty high prices; it was higher

(Testimony of A. F. Lieurance.)

than I have been in the habit of paying for merchandise. There was approximately $100,000 worth of ladies' [320] ready-to-wear, and kindred lines, coats, dresses, suits, and merchandise of that nature that had been bought for the spring season, and the spring season was just about past. That merchandise deteriorates very rapidly. The element of style is almost everything in the value of such merchandise. However, we took this merchandise in at cost, at its original cost as shown by the Pilcher Co. There was a considerable portion of cheap jewelry; someone had been permitted to send a lot of jewelry to these various stores, and, if I am not mistaken, the aggregate of it was about $10,000. It was the kind that turns green in a few days. In addition to that there was a big lot of overcoats that had been bought from the Black Manufacturing Co. as a job lot. They could not be disposed of in the summer time. There were about 2,000 of those coats, and, if I am not mistaken, they cost about $13 apiece, or $12 apiece, or something like that. Then, too, this merchandise, or quite a lot of it, was too high priced for the people in the communities where they were trying to sell it to get the people to consume it; they don't buy merchandise of that character, or that quality. They had in these stores Nunn-Bush shoes; they are a very high-grade shoe, and they are not adapted to communities of that kind. You can sell a few pair, but to carry them in stock they are virtually a frozen asset. That condition prevailed in the

(Testimony of A. F. Lieurance.)

ready-to-wear lines, too. Dresses in those stores would sell as high as $75 or $80, and some as high as $150; they won't go in the country towns. The people cannot consume them at those prices—at least that has been my experience.

We sold over the counter just a little under $500,000.00 worth of merchandise during the five months we conducted the business. In addition to that, we sold the stores out for $257,600, making in all a total of approximately $750,000.

I received various bids on these stores, accompanied by certified checks. We deposited those checks in the bank, and ran [321] them just the same as money received. We didn't know who the successful bidder would be. After the stores were sold we returned to the unsuccessful bidders the money they had deposited with their bid, which was 20 per cent of the amount bid.

Q. What means did you take to rid the institution of these goods you found to be hardly marketable, or, at least that were questionable as to their marketability?

A. The season for the ready-to-wear goods had passed, or had virtually passed, and the season for the overcoats was not here yet, and they involved considerable money. We resorted to sensational tactics in order to get rid of the ready-to-wear over the counter, and we obtained a pretty good price for it. We realized $499,000 worth of sales and disposed practically of all of this ready-to-wear.

(Testimony of A. F. Lieurance.)

Q. These tactics that you refer to, just what do you mean by that? A. Sales.

Q. Do you mean special sales, and things of that character?

A. Yes, and advertising campaigns, and any legitimate business tactics that will permit the sale of any particular item you want to dispose of, or, for that matter, the stock generally.

From the time that I was appointed, and assumed the duties of Receiver, all of my time was given to this business. That time was not limited to the usual working hours of the day; you cannot run chain stores that way if you take any interest in them; it was day and night. I didn't pay any attention to holidays and Sundays when I had work to do. I certainly did have lots of work to do in relation to this business. I worked many Sundays and holidays in connection with this business, and many, many nights; I worked more nights than nights I did not work. It was all in connection with this business.

(Counsel for plaintiffs offered in evidence the stipulations pertaining to the reduction of the temporary allowances; such stipulations being four in number, and entitled, respectively, in the [322] four several District Courts of the United States hereinbefore referred to as the "Western Jurisdictions"; all being entitled in the matter of "Sidney Gilson, et al., Complainant, v. R. A. Pilcher Co., Inc., Defendant"; and which stipulations were

received in evidence and collectively marked Receiver's Exhibit 12."

All of such stipulations, constituting Receivers' Exhibit 12, received in evidence as above stated, were exactly the same, except as to the title of the court and the dates and the amounts of the original allowances and the amounts of the reduced allowances, respectively. Therefore, a copy of only one of these stipulations will be sufficient, and for that purpose the stipulation in the case pending in the Northern District of California has been selected and which reads as follows:

(Title of Cause.)

"STIPULATION.

WHEREAS, upon ex parte application, the above entitled Court by its order made on the 10th day of December, 1926, did, among other things, grant and allow to the Receivers, A. F. Lieurance and Arthur F. Gotthold,to apply on account of services rendered by them in the above entitled proceeding, the sum of Ten Thousand Dollars ($10,000) to be divided as follows: Seventy-five per cent (75%) thereof to Receiver Lieurance, and twenty-five per cent (25%) thereof to Receiver Gotthold; and

WHEREAS, by the same Order the said Court authorized and allowed a payment to Edward R. Eliassen, Esq., attorney for the Receivers, of the sum of Ten Thousand Dollars ($10,000) to apply on

account of services rendered by him as such attorney in the premises; and

WHEREAS, objections to the amounts of the aforesaid allowances have been made,

NOW THEREFORE, for good and sufficient reasons and considerations, it is hereby stipulated and agreed as follows: [323]

First: That said allowance of Ten Thousand Dollars ($10,000) to said Receivers A. F. Lieurance and Arthur F. Gotthold shall be reduced to Three Thousand five hundred Dollars ($3500), which amount shall be payable solely to Receiver A. F. Lieurance, his Co-receiver Arthur F. Gotthold, having waived participation therein, and said A. F. Lieurance having done all the work of the Receivers within this jurisdiction;

Second: That said allowance of Ten Thousand Dollars ($10,000) to Edward R. Eliassen, Esq., attorney for said Receivers, be reduced to Five Thousand Five Hundred Dollars ($5,500);

Third: That said reduced allowances shall not be further reduced;

Fourth: That by consent of the respective parties hereto said Order which was made by the above entitled Court on the 10th day of December, 1926, shall be amended to conform to the terms and conditions of this stipulation;

Fifth: That the above entitled Court shall have the exclusive right to fix the fees and compensation of the Receiver A. F. Lieurance, and the fees and compensation of Edward R. Eliassen, attorney for the Receivers in the above entitled proceeding,

whether or not any further proceedings are taken in bankruptcy proceedings now pending or in any other bankruptcy proceedings that may be instituted hereafter.

Sixth: That the final fixation of the fees of A. F. Lieurance as Receiver, and of Edward R. Eliassen, as attorney for the Receivers in the above entitled matter, shall be made by the above entitled Court at the time of the hearing on the final account of the Receivers herein, and that notice of the time and place of such hearing shall be given to all of the known creditors of the defendant company by mailing notices to them at their last known addresses at least thirty days before such hearing and that no other or further fixation of their respective fees shall be made [324] by said Court in the meantime.

Seventh: That this stipulation shall not be construed to be any limitation whatever upon the right of said Receiver Lieurance or of his said Attorney Eliassen, at the time of such final fixation of fees, to apply for or receive additional fees or compensation for services either heretofore or hereafter rendered by them or either of them; or upon the right of any creditor or creditors to oppose or contest any such application or applications, if and when so made.

Dated: February 1st, 1927."

(Signed) "A. F. LIEURANCE,
EDWARD R. ELIASSEN,
CREDITORS' COMMITTEE REPRESENTING EASTERN CREDITORS OF R. A. PILCHER CO., INC.,
By WALTON N. MOORE,
Member and Authorized Representative.
CREDITORS' COMMITTEE REPRESENTING WESTERN CREDITORS OF R. A. PILCHER CO., INC.,
By WALTON N. MOORE,
Chairman.
JOSEPH KIRK.
FRANCIS J. HENEY,
Attorney for the Above-mentioned Committees and the Creditors Represented by Such Committees Respectively." [325]

(Thereupon, counsel for plaintiffs offered in evidence the letters from creditors, above referred to, relating to the "conduct of this business" by Receiver Lieurance, and the matter of his compensation; which letters were on file in this proceeding; and which letters were read into the record, as follows:)

(Letter-head of the Weber Show Case & Fixture Co.)

Los Angeles, Cal. U. S. A. August 9, 1927.

"To the Honorable, the Judge of the District Court of the United States, San Francisco, California.

Dear Sir;

It has come to our attention that Mr. A. F. Lieu-

rance and his Attorney, Mr. Eliassen, have met with certain opposition in the matter of the settlement of the financial accounts of the Receivers in the Pilcher matter.

Our claim was probably one of the largest in this matter (being over $35,000) and we, therefore, know that this receivership possessed many complications and was very difficult to handle. These men have done a splendid piece of work and we feel that their efforts should be recognized to the extent that nothing is done to hinder the winding up of this matter.

We want to go on record as not raising any objections to the fees being paid according to the court's order.

Yours very truly,
WEBER SHOWCASE & FIXTURE CO.,
Secretary.

CC to Mr. William Frazer,
c/o J. P. Stevens Company,
27 Thomas Street, New York City, N. Y."

(The foregoing letter is filed in this proceeding and contains the Clerk's Number "62.")

(Copy of letter to William Fraser.)

July 27, 1927.

Mr. William Frazer,
c/o J. P. Stevens Company,
27 Thomas Street, New York City, N. Y.

Dear Mr. Frazer:

Mr. A. F. Lieurance called on me today and in going over the Pilcher matters he tells me that from certain quarters there have been objections made to his fees for administration, as well as his attorney, Mr. Eliassen's. [326]

I am strongly of the opinion that these men have done a splendid piece of work, as I have written you before, and I do not believe that any steps should be taken from any quarters to hinder the winding up of this very unfortunate matter, but these men should be allowed to draw what they are entitled to or the amounts the different courts have awarded them as ad interim allowances in December.

I want you to know that the A. V. Love Dry Goods Company, or the writer, has not been or is not a party to any objections that have been raised to these fees being paid according to the court's order, and as you know we are one of the heaviest creditors.

I have not been able to see nor understand why there should be any steps taken in New York City to throw this matter into bankruptcy as I cannot see wherein there was even a chance that the creditors could get one more dollar by proceedings of this kind. On the other hand I can see where a great deal of expense could be created and thereby knock the creditors out of just that much money. You must know that the assets of this company were on the Pacific Coast and that the work was actually done out here and that any compensation that should be rendered should be to those who did the work, and that was on the Pacific Coast by Mr. Lieurance and his attorney.

Therefore, I sincerely hope that you will use your

(Testimony of A. F. Lieurance.)

influence to have this unfair opposition towards Mr. Lieurance and Mr. Eliassen withdrawn.

Sincerely yours,

A. V. LOVE DRY GOODS COMPANY.

A. V. LOVE,

President.

(The foregoing letter is filed in this proceeding and contains the Clerk's number "64.")

Direct Examination of Witness LIEURANCE by Mr. CROSBY.

I know Mr. A. V. Love personally. He was a member of the New York Creditors' Committee.

Q. Was he a member of the Western Creditors' Committee?

A. Well, I don't know what you refer to as the Western Creditors' Committee.

Q. Was there any such committee in the west, here, as there was in the east?

A. Not unless it was the Board of Trade in San Francisco.

(Thereupon, the remaining letters above referred to were introduced in evidence and read into the record as follows:)

(Letter-head "The Journal-Afternoon-Sunday.")

"Portland, Oregon, September 6, 1927. [327]

A. F. Lieurance,

Receiver R. A. Pilcher Co.,

Central Bank Bldg.,

Oakland, California.

Dear Sir:

Our attention has been called to the fact that a

remonstrance has been filed against the allowance of the fees for the attorney and receiver in the above matter.

The Journal, as a creditor of the estate, is well pleased with the manner in which its business has been handled and the dividend that we have received is unusually large under the circumstances.

We take this opportunity to assure you that we have no objection to any fees for both the receiver and the attorney that the court has or may allow in this matter. We feel perfectly satisfied that the court will treat both the receiver and his attorney and the creditors justly and fairly.

Yours very truly,
JOURNAL PUBLISHING CO.,
By Julia Holiday, Secretary."

(The foregoing letter was filed in this proceeding and contains the Clerk's number "60.")

(Letter-head of LOWENGART & COMPANY.)

"Portland, Oregon, September 7, 1927.

Mr. A. F. Lieurance,
Receiver of R. A. Pilcher Co.,
Central Bank Building, Oakland, California.

Dear Sir:

We have just heard that certain creditors of the Pilcher Company have objected to fees that have been allowed by the Judges of the United States Court to you and your attorney for services rendered.

(Testimony of A. F. Lieurance.)

We, as creditors of the Pilcher Company, have been well satisfied with the work that you and your attorney have done. The results you have obtained have been satisfactory to us. We are perfectly willing and satisfied that the Court, which has knowledge of all of the work that has been performed, fix a fee that it thinks fair and reasonable for you and your attorney.

There will be no objection on our part to this procedure which we think is fit and proper.

Yours very truly,

LOWENGART & COMPANY,

H. CLARK,

Credit Mngr."

(The foregoing letter was filed in this proceeding and contains the Clerk's Number "61.") [328]

Cross-examination by Mr. HENEY.

(A letter which appears to have been sent out by the Creditors' Committee, dated May 28, 1926, was shown to the witness.) I don't remember ever having received a copy of this letter. I would have to refer to my record here to ascertain that.

(The letter was left with the witness to enable him to examine his record with reference to it.)

Referring to the conversation which occurred in Mr. Kirk's office on December 9, 1926, when Mr. Walton N. Moore was present: Mr. Eliassen and I met Mr. Moore in his store on Mission Street and went over with him to Mr. Kirk's office; that was the beginning of the conference. I think we went

(Testimony of A. F. Lieurance.)

to Mr. Moore's office in response to a request from Mr. Moore, by telephone.

Q. Now, tell us what occurred in Mr. Kirk's office?

A. We were informed either by Mr. Moore or Mr. Kirk that a telegram or some communication had been received from New York in regard to fees and compensation of the Receivers. It developed that there had been an application made in New York by McManus, Ernst & Ernst, and also by Mr. Gotthold, for interim allowances to the attorneys and the Receivers in New York. They had referred —someone, Mr. Frazer, I believe, had referred the matter to Mr. Moore, in San Francisco, who was a member of the Creditors' Committee and had also referred the matter to Mr. A. V. Love, of Seattle, Washington, who was a member of the Creditors' Committee. In the conversation, or in the—

Q. Pardon me just a moment, Mr. Lieurance. I show you a copy of a telegram, I think it is of December 8, 1926; examine that and see if that is the communication to which you refer in your testimony just given.

A. I never saw the telegram, Mr. Heney. I don't know. I could not identify this. I didn't see it. It just developed in the conversation that some communication had been received. The telegram, as I remember it, was not read. [329]

Q. Was the substance of it stated?

A. The purpose of it was stated. I do not know that it was given in any detail. That was the sense

(Testimony of A. F. Lieurance.)

of the meeting, that they wanted some information in regard to the allowances that were to be made to the attorney and the Receivers.

The MASTER.—Q. There, or here?

A. It covered the whole jurisdiction, that is, the whole administration in all of the jurisdictions.

I could only state in substance what was said,—the sense of the meeting. Mr. Moore and Mr. Kirk were desirous of knowing what allowance on account Mr. Eliassen and I would ask for. We told him that that was a matter that we had not fixed upon, we had not fixed the price, and preferred to leave that to the Court. Mr. Moore said he thought that was as fair as could be done. Mr. Kirk drafted a telegram to Mr. Fraser in New York, in the presence of Mr. Eliassen, and Mr. Moore, and myself, and the telegram is a matter of record. That was the sense of the meeting.

I do not remember anything else that was said while Mr. Moore was present,—no specific thing, just the general conversation.

Prior to this time, I heard that Judge Hand had signed an order directing the Receivers to pay the creditors 40%. I believe it was stated in that meeting.

Q. Did either Mr. Moore or Mr. Kirk state in that conference while Mr. Moore was present that the Receivers had applied in New York for a partial allowance of $10,000 to be equally divided?

A. I don't remember that the amount was stipulated. I knew the amount at that time, because I

(Testimony of A. F. Lieurance.)

had received, I think, a telegram from McManus, Ernst & Ernst, or from Mr. Gotthold, stating that they were going to make an application for $10,000, an allowance of $10,000 to the attorney and to the receiver in New York. I don't remember whether it was stated in that conference, or not, but I knew that. [330]

I think the telegram that I refer to stated that the $10,000 was to be divided between the Receivers equally. That fact was discussed with Mr. Moore, on the way over from the store to Mr. Kirk's office. Mr. Moore advanced the idea that Mr. Gotthold had done none of the work in the western jurisdiction and, therefore, was not entitled to any fee, and that I had done all the work out here and it should be so considered that way. I did not say that Mr. Gotthold was not entitled to any fee in New York, he said in the western jurisdiction, because he had done none of the work here.

Q. Did he also suggest the idea, or was the statement made, that $10,000 was to be applied for the Receivers in New York and to be divided equally?

A. I don't know that the statement was made in the conference.

Q. Was it made on the way over to the conference?

A. It was discussed somewhere; and I think that is where it was.

Mr. Moore said that he thought I ought not to participate in the fee that was granted in New York; I expressed agreement with him on that.

(Testimony of A. F. Lieurance.)

Mr. Moore stated that he considered that the $10,000 that was applied for, for the attorneys in New York, was excessive for the amount of work they had done. I could not state definitely whether that was said on the way over or whether it was in the conference. It was the general concensus of the meeting, or the opinion of the meeting, rather, that the fees asked for in New York were excessive for the amount of work done.

I didn't express any view. I could not state definitely that Mr. Eliassen, in that conference, expressed the view that the fees asked for in New York were excessive. I could not state definitely that he did not.

I don't recall that in that conference, it was suggested that Judge Hand had invited suggestions from the Committee of Creditors as to the amount to be allowed. I had that information from Mr. [331] Love in a telegram from Seattle, so I was aware of the fact. Whether I got it there or whether I got it in this conference, I don't know. I might have gotten it in both places.

Q. Was it stated that the committee in New York wanted to know what the total amount that Lieurance and Eliassen were going to ask so as to put them in a position to be able to make recommendations to Judge Hand in regard to allowances in New York?

A. It was the understanding that they wanted information as to how much we would ask for. What the purpose was, I don't know.

(Testimony of A. F. Lieurance.)

Q. Was it not stated what the purpose was?

A. I don't recall that it was stated what the purpose was.

Q. Was not the telegram that Mr. Moore had received from William Fraser the telegram of December 8, 1926, wasn't it lying there on the table during this discussion at Mr. Kirk's office?

A. My recollection is that Mr. Kirk had the telegram.

Q. In his hand? A. I am not sure.

Q. Did not Mr. Kirk state the substance of it?

A. Just in a general way he stated that he had received, or that Mr. Moore had received this communication.

Q. Did he not read it?

A. I don't recall that he read it. I don't think he did.

Q. Have you a positive recollection on that subject?

A. I could not say positively, but I don't remember its ever having been read. The substance of it was generally known.

On the way over, Mr. Moore told us that he wanted us to go to Mr. Kirk's office, for the purpose of a conference in regard to this matter of fees and compensation. I could not state positively that he told us that it was on account of a telegram he had received from William Fraser, but I think he did.

Q. Didn't he tell you the nature of the information in it?

A. I don't know whether I got that information

(Testimony of A. F. Lieurance.)

from him or whether I got it from Mr. Love's telegram. I got the information, all right. [332]

So that when we went to Mr. Kirk's office I knew what the purpose of the conference was. I didn't go there blindly.

There was something said in regard to the fact that Ernst intended to apply for an additional $10,000, as a final payment.

Q. Did not Mr. Eliassen express the opinion that $20,000 was too much for the work that had been done by the attorneys in New York?

A. In the one jurisdiction, I think so.

Q. Do you recall anything being said about the advisability of a statement being prepared by Mr. Eliassen and yourself as to services performed, to be used as a basis for discussion by the Creditors' Committee and the attorneys in the east, to reach a conclusion as to what would be fair compensation for each of the Receivers and the attorneys here and in New York?

A. There never has been any statement asked for.

Q. Do you recall anything being said on the subject in that conference? A. I do not.

After Mr. Moore left Mr. Kirk's office, Mr. Kirk spoke of having collected a number of claims through the Board of Trade, and stated that he had sent those to New York. It developed after those claims had been sent to New York that the disbursements of the funds of the dividends to the creditors, would be paid from here. He wanted to know that those claims would have the same standing and the

(Testimony of A. F. Lieurance.)

same attention as though they had been filed here, and I prepared a stipulation, or some sort of a paper of that kind, and asked Mr. Eliassen if he would so stipulate that those claims should be considered as though they had been filed with me in Oakland. Mr. Eliassen acceded to the demand or request, and the stipulation was signed.

Q. Did not Mr. Eliassen already have that and bring it with him; had he not received it previously from Mr. Kirk, and did he not bring it with him?

A. I don't know. I know that the stipulation was produced. Whether [333] Mr. Kirk produced it or whether it had been sent to Mr. Eliassen previously, I don't know.

Q. Do you remember anything else that was said on that occasion?

A. Mr. Eliassen said, "We are going out to court in the morning in the matter of this 40 per cent. dividend and the matter of our allowances on account." He asked Mr. Kirk if he would be there. Mr. Kirk said he did not suppose it was necessary, or words to that effect. Mr. Eliassen told him he would take the stipulation, or whatever it was, to court then and have it filed, or get an order, or do whatever was necessary to do. Mr. Kirk thanked him for the courtesy. The last thing that was said, as I remember it, in the matter of the allowances to myself and Mr. Eliassen, was that whatever to the Court may seem fair and equitable would be all right. We then bade him good-day and left.

(At this point, counsel for plaintiffs stipulated

(Testimony of A. F. Lieurance.)

concerning the matter of Mr. Eliassen bringing those papers over from Oakland as follows: It will be stipulated that they had been sent to Mr. Eliassen by Mr. Kirk, and on that day were brought over by Mr. Eliassen to Mr. Kirk's office.)

Q. You say that Mr. Eliassen said to Mr. Kirk that he was going out the following morning to present not only the order for the 40 per cent dividend, but also to have a hearing on his petition for the allowance of fees to the Receiver and himself on account. A. Yes.

Q. And Mr. Kirk did not say anything except to say it was all right?

A. Mr. Eliassen asked him if he would be there and he said he did not think it was necessary, or words to that effect.

Mr. Kirk dictated, in my presence, to a stenographer, the telegram which Walton N. Moore signed, being a telegram to William Fraser dated December 9, 1926.

Q. Did you hear him make this statement in dictating the telegram: "I earnestly request that the question of such allowances be deferred for time being until Receivers and attorneys and committees [334] can exchange views and come to some agreement concerning gross amounts to be asked for"?

A. I did.

Q. What discussion, if any, was there at the conference when that statement was dictated by Mr. Kirk?

A. There was no discussion regarding the tele-

(Testimony of A. F. Lieurance.)

gram. That was Mr. Kirk's telegram, that is, as I remember it. The sense of the meeting, and the sense of the understanding was—

Q. Just a moment, I object to that. I want to know what was said. We will draw our own inferences as to the sense of it.

A. All right. Just the telegram was dictated.

Q. Was there anything said at the time that statement was dictated by Mr. Kirk, was there anything said by anybody present as to whether or not that was correct?

A. I don't remember that there was anything said.

Q. Or was there any discussion about it?

A. I don't remember that there was any discussion about it at that time.

I state that there was approximately $100,000 expended in the purchase of goods, in continuing the business. The bulk of those goods were purchased west. Some were purchased from the Walton N. Moore Dry Goods Company, and some from the A. V. Love Dry Goods Company. As a matter of fact, I think the largest purchases were from the A. V. Love Dry Goods Company, because most of the stores were near to that source of supply. Some shoes were purchased in St. Louis. Other merchandise was purchased here in San Francisco,—they were purchased at various places that had the merchandise, some in Portland, Oregon, wherever the nearest source of supply was, that is where the merchandise was ob-

(Testimony of A. F. Lieurance.)

tained. Some of it was purchased from the Spokane Dry Goods Company.

I think the account here shows the total amount that was purchased from Love & Company; I don't know just in what order it is given, but it would show the amount paid. [335]

(It was stated by counsel that the books were in Oakland at that time but that the amounts would be furnished later; thereupon, the witness continued as follows:)

I would hazard a guess at the amount, and I think I know pretty close to what it is, but I don't want to be held too strictly to that. If I am not mistaken I think it is approximately $30,000 from the A. V. Love Dry Goods Company. Now, when I say $30,000, that is giving it in round figures; it might be $32,000, or it might be $28,000. I may be wrong entirely, but I think that is the amount, or close to it, if my recollection serves me right.

I have known Mr. Love for about ten years. I have had numerous transactions with him, for the Penney Company. The aggregate volumes of those transactions was very large.

Q. You and he, then, have been somewhat intimate friends during this period?

A. Only in a business way. I found him the very soul of honor, and a perfect gentleman to do business with. He always has been.

Q. Both found the connection profitable?

A. It was profitable for me. I don't know whether it was profitable for Mr. Love, or not. Evi-

(Testimony of A. F. Lieurance.)

dently it was, or else he would not have carried it on.

I had talks with Mr. Love about the attitude of some of the Creditors' Committee in regard to the fees of the Receiver and of the attorney, after those allowances on account were made. I don't know that it was before they were reduced, but I have had several talks with Mr. Love; in fact, every time I go to Seattle I have a talk with him. I mean since those allowances were reduced.

Q. Did you tell him in one or more of those talks that you believed that the opposition of Mr. Moore and Mr. Kirk came from the fact that you believed Mr. Kirk had a feeling against you and Mr. Eliassen, on account of not having been taken into this matter? A. I probably did. [336]

Q. Can you tell us the substance of what you told him?

A. I have some letters here that I have written to Mr. Love that speak for themselves, if you would like to introduce them. I have kept him informed continually regarding the developments in this business, and regarding all of the controversies that we have had, because he is a member of the Creditors' Committee, and I felt it my duty to do that, and I have done it.

The letters are right here. There are quite a lot of them, throughout the whole administration.

(The letters referred to were produced and handed to Mr. Heney for his examination; and the witness continued:)

(Testimony of A. F. Lieurance.)

All the information that has been given to Mr. Love by letter has been repeated verbally in our conferences, or in our visits, or whatever you want to call them. The sense of the whole thing is contained in these letters.

Q. What was it you told Mr. Love about there being any effort in New York to throw this matter in bankruptcy?

Q. Nothing lately. It was early in the course of the administration.

Q. You mean the information contained in the original document you got, that a bankruptcy proceeding was started for the purpose of stopping attachments?

A. I don't know why Mr. Love refers to bankruptcy there, but that has been a sore spot with Mr. Love always, the threat of bankruptcy, etc., and he has had numerous communications from various sources, in New York principally—I say "various sources, he has had information from time to time and I judge from his attitude toward it, and from his conversation with me, that that has been a little sore spot with him. He did not want the bankruptcy.

There was a petition filed in bankruptcy but I think it was never carried through. The petition had not been filed before I came into the transaction. I think it was some time afterward, quite a little time afterwards. The petition in bankruptcy was not to [337] stop attachments. The Court rather restrained everybody and everything. I don't know

(Testimony of A. F. Lieurance.)

whether that took away the preferential rights of an attachment; I could not tell you. I remember the letter or telegram from McManus, Ernst & Ernst, relating to that subject, which was produced in evidence here this morning.

Q. And they started the bankruptcy proceedings for the purpose of killing off these attachments, and then didn't go ahead with it, but proceeded with the receivership?

A. That was virtually the purpose, as I remember it, as stated in the McManus letter.

Q. And don't you know that they are now in a position where they have arranged with the bankruptcy referee there that when they get all through with the receivership that they are to account in the bankruptcy court?

A. I know there have been some steps taken in bankruptcy, but I could not tell you just what they are, Mr. Heney.

I don't think that I did any advertising in the "Journal" at Portland, Oregon, during the time that I was putting on these advertising sales that I have described. I might have. I would not be sure about that. The placing of the advertising, after it was prepared, was left to the store manager. He might have advertised in the "Journal," or he might have advertised in the "Oregonian." I don't know what paper he advertised in. He advertised in a paper that had a good circulation.

Q. Mr. Crosby wanted me to stipulate with him here this morning that you knew all the details of

(Testimony of A. F. Lieurance.)

this business. Now, you say you did not know where the advertising was done?

A. Not in that particular case, I don't know whether it was in the "Journal, or in the "Oregonian." I could not tell you.

Q. Do you know whether or not they did any advertising in the "Journal"?

A. No, I could not testify to that. Portland is a big city. Different papers reach different classes of trade, just like in San Francisco or any other city. If that is [338] the paper that reached the particular trade that we were after, that is the paper the advertising was done in. In the smaller towns there is a paper that dominates the whole situation.

Q. What class of trade were you after in Portland, and I can tell you whether the "Journal" would reach it.

A. Well, these stores catered to the popular-price trade, not the silk-hat trade, as it is called, as it is commonly referred to. We just wanted to reach the medium-priced trade with that merchandise.

I don't know whether the Penney Company was in the habit of placing any advertisements in the "Journal." Those are matters which are left to the store manager. I have no relation whatever with anybody on the "Journal." I don't know anybody there. I could not have told you that there was a "Journal."

I don't know how the Journal Publishing Company came to write this letter of September 6, 1926,

(Testimony of A. F. Lieurance.)

unless it was through the efforts of Mr. Stott, the local attorney up there. I don't know that that is right, either, but that is the only source that I can imagine. Mr. Eliassen employed Mr. Stott to do some work up there in the receivership; I did not employ him.

Q. Do you know how the Weber Showcase & Fixture Co., of Los Angeles, came to write this letter?

A. I think Mr. Eliassen wrote them a letter, or maybe I wrote it, I am not sure; I think Mr. Eliassen wrote those people and told them the situation, and that is the response.

(Counsel for the objecting creditors then asked for a copy of the letter referred to; after some discussion, the witness further testified upon the subject, as follows:)

I am not sure whether there was a letter written about that. I rather doubt it, on second thought. If I am not mistaken, I rather think that letter is the result of some verbal conversation with the attorney for the Weber Showcase Company.

Q. Between you and him?

A. No, I have not seen him since [339] the time it came. I don't know now that that is right. I might be mistaken about that. I don't know where that information came from.

Q. Verbal conversation between whom?

A. Between Mr. Eliassen, I think, and this attorney. They were up here in the interest of their claim, that is, they were up in Oakland in the in-

(Testimony of A. F. Lieurance.)

terest of their claim. That is how I came to meet them.

Q. By the way, the fixtures of these stores, the value of them was not included in the approximate amount of $600,000 that you mentioned in your testimony, was it?

A. No. There was a peculiar condition in regard to the fixtures. The majority of them had been supplied by the Weber Showcase Company on the lease contract plan. Through clauses in these contracts they retained title. They had several options, either of which they might have exercised. They retained title to all of the equipment until it was paid for. So the fixtures were not paid for. Something was paid on account. There was no way of arriving definitely at the value of the fixtures, except in two or three stores, and those were fixtures that were not supplied by the Weber Showcase Company. However, there were other fixtures in the stores, like dress forms, and window fixtures, sundry fixtures, they might be termed, and typewriters, adding machines, and things of that kind, and some of those, I think, were bought on the installment plan, and title to the greater part of that stuff had never been obtained.

Q. It states in this letter of the Weber Showcase and Fixture Company: "Our claim was probably one of the largest in this matter, being for $35,000." Does that mean that that is the amount that they claimed was still owing upon the contracts?

A. Yes. If I am not mistaken, they supplied in

(Testimony of A. F. Lieurance.)

the neighborhood of $67,000 or $70,000 worth of equipment; maybe $65,000 or $60,000,—I don't remember just what the amount was.

That equipment was sold with the stores; that is, only the [340] right, title and interest of the Pilcher Company, whatever it was. So that the purchaser was able to go ahead and keep the contract if he could make his settlement with the Weber Showcase Company or whoever else might have had a lien on the equipment. We sold only the right, title and interest of the Pilcher Company and did not attempt to designate that interest.

Although the title remained in the Weber Showcase & Fixture Company, they claimed that they had a claim against the Pilcher Company; their lease contracts so read. As to all the equipment that they had supplied ot the Pilcher Co., title to all of it remained in the Weber Showcase Company until it was all paid for.

Q. They could take it back, but they could not have any claim for any balance due against the Pilcher Company under your contracts with them?

A. I think they could have taken it back; they could have taken all of it.

Q. Did not Mr. Eliassen advise you that they would not have any further claim against the Pilcher Company? A. I don't know.

The MASTER.—Q. Were their claims allowed?

A. Their claims were reduced.

Q. By how much? A. $16,000.

Q. Their claim was cut in two?

(Testimony of A. F. Lieurance.)

A. It was cut in two. After they came up here and took it before a master, during the proceedings, and at lunch-time, I had a talk with the attorney and the secretary of the Weber Showcase Company, and explained to them that we had received bids on that furniture in the event that we could deliver it, in the event the title could be obtained, we had received bids aggregating $15,000. These bids were received over and above the amount that the stores brought. We could not give title to the fixtures, because the Weber Showcase Company would not give us the title. I told them that in fairness to the creditors, and in fairness to me, that their account, if they were going to exercise the option in their contracts to replevin [341] these fixtures—that their account should be reduced the amount I could have gotten for those fixtures, and they obligingly did that, and said they thought it was fair and right, that they had stood in the way of our getting any money out of these fixtures, and they reduced the account, cutting off $16,000, and came in as general creditors for $16,000, on which they were paid approximately $8,000 on a $35,000 claim.

Mr. HENEY.—Q. They were not entitled to come in legally as general creditors of the estate. Did not Mr. Eliassen so advise you?

A. No, sir, I think they were entitled to come in.

Q. Did Mr. Eliassen so advise you? A. No.

(After a discussion by counsel concerning the contracts above mentioned and Mr. Eliassen's ad-

(Testimony of A. F. Lieurance.)

vice concerning them, the following proceedings took place:)

The MASTER.—I don't see any particular importance about this. As a matter of fact, I don't give any particular weight to the letters you are cross-examining him on now, Mr. Heney, because I will take it for granted that some were pleased and some were not pleased.

Mr. HENEY.—I thank your Honor for expressing yourself on that. I felt that it was taking up more time that its importance demanded.

Cross-examination of Witness LIEURANCE by Mr. HENEY (Resumed).

Q. Now, on the question of those leases for those different stores, did Mr. Eliassen advise you that the lessors might have a right that they could subsequently enforce against Pilcher & Co., but that they had no right against the assets of Pilcher & Co. which were in the hands of the Receiver, except for so much of the rent as had already accrued?

A. My understanding about the leases was that they could file a claim for any unearned rent against the estate.

Q. Did Mr. Eliassen so advise you? [342]

A. Mr. Heney, we have had a number of conferences and conversations about the leases, and the leases individually; to just state that I have been advised this or that, I would not want to do that. I have given you the general impression that I got,

(Testimony of A. F. Lieurance.)

and the general conclusion from our conversations, with regard to the leases.

We have not the leases. They were turned over to the purchasers of the stores. I have not copies of them. We sold whatever right, title and interest there was. There was not much interest in the leases. I was not the only one that did not consider the equity in the leases very valuable.

I am informed that Mr. Pilcher was employed to assist the receivership, by the Creditors' Committee. That is a matter of record in the minutes of the meeting of the Creditors' Committee in New York, I did not personally employ him. I stopped his pay, when he came out here, and I learned something about the affair from him and from Mr. Ernst.

I said that I have a store at Ukiah. At the time I took this receivership, I was contemplating starting some more stores; I am still contemplating it.

Q. Did you entertain the idea that possibly some of those stores might be available to you?

A. No, I did not entertain that idea. I have been spoken to a number of times about that, and could have been a partner of Mr. Pilcher when he started this venture if I had wanted to be.

Mr. Pilcher was employed at one time by the Penney Company. He was a stockholder in that company. He was there with me about four years. He was there even after I left New York and came west. He was there for some little time. I don't

(Testimony of A. F. Lieurance.)

know how long he was with the Penney Company, exactly, but five or six years, roughly.

The ranch that I have is comprised of 617 acres of land, all under cultivation; about 500 head of hogs, about 150 or 160 acres of alfalfa, 108 acres of almonds. [343]

Q. Did you go near that during this time?

A. (Continuing.) Also $7,000 or $8,000 worth of Prince of Wales sheep

Q. Didn't you go near that during these five or six months?

A. I have been there about three or four times, Mr. Heney. I conduct the ranch with a manager and I always have.

Q. I suppose you have a good, competent man?

A. He is fairly capable as a farmer. He is not such a whiz as a business man. He is all right running the dirt end of it.

Q. Do you look after the sale of products?

A. I have, except last year, I was not at home, I was away on the Pilcher Company business. I am sorry that I was away, extremely so.

Q. You didn't look out for it last year?

A. No, and as a result I am a loser to the amount of about $5,000.

Q. You didn't have prunes, did you?

A. No. This year I sold the product myself and I am much happier over the result. And also the previous year I did the same thing. It is a hazardous business at the best, I can assure you of that.

(Testimony of A. F. Lieurance.)

Redirect Examination by Mr. CROSBY.

I accompanied Mr. Eliassen into the various jurisdictions when applications were made for temporary allowances. We went into the courts in the ancillary jurisdictions, to ask for allowances on account to the attorney and the Receivers, and went through with what I suppose is the regular form of proceeding in the matter in court. I was put on the witness-stand by Mr. Eliassen and asked a number of questions, whether I was the Receiver, and if I qualified, and if the report was true. I suppose that is the natural course of such things. I could not repeat it all, word for word, but that is the nature of it. Included in this was the application to pay a dividend of 40 per cent. The Court asked about what amount of money there was on hand, and whether or not we could safely pay that large a dividend, and asked a number of questions in regard to the condition of the estate, and how the receivership was progressing, and [344] took whatever interest the Court felt was necessary. They asked how much compensation the attorneys and the Receivers were asking for on account. When that question has been asked me I have said, without exception, that that is a matter that is to be left entirely to the discretion of the Court, whatever seems to the Court fair and equitable is all right. In Judge St. Sure's court, after the preliminary part of the presentation of the report, and the asking for the allowances, etc., the Court asked how much we were asking for, and Mr. Eliassen

(Testimony of A. F. Lieurance.)

told him that that was a matter to be left to the discretion of the Court. As I remember it, the Judge asked if an allowance had been made in any other jurisdiction, and Mr. Eliassen replied there had not been, but that an application had been made for an allowance on account in New York. He asked what the amount was, and Mr. Eliassen said $10,000. The Court said, "I will make an order to that effect, if that is satisfactory." Mr. Eliassen said: "Anything that satisfies the Court." I was asked how much I was asking for. I said to the Court that this was a matter to be heard in four jurisdictions, that I had set no figure, and that it was a matter to be left to the Court. He said he understood that. So he said, "$10,000 to the receiver." I asked him what division he would make of that, that I had done all the work in the western jurisdictions, and Mr. Gotthold had done none of it. He said, "Why not split it 50-50?" I said, "Do you think that would be fair?" After some hesitation he said, "No, make it 75 and 25." That ended the conversation, or, rather, that ended the hearing. I don't think there was anything else after that. The order was made and that was the end of it. We went to Portland. Judge Bean was not at home; he was away, and would not be back for some three or four days, or whatever time it was. We made an appointment there at that particular time to see him a subsequent date. We proceeded to Spokane. We had a hearing before Judge Webster. Judge Webster asked how much

(Testimony of A. F. Lieurance.)

we were asking for, [345] after he had approved the payment of the 40 per cent dividend, and I told him that that was a matter that was to be left entirely to the Court. I emphasized that fact. He said he understood that. He commented upon the result of the administration, and said that he was ready to fix the fee, and pressed me for an answer as to how much I would expect. I repeated that that was a matter that was to be left to the Court, whatever to the Court seemed fair and equitable would be satisfactory. He said, "You must have some idea what the services are worth." I said to him, "This is a matter of allowance on account, as I understand it." He said, "Well, what would you charge for the services?" I said, "If I were setting a fee I would set it at 5 per cent of the gross sales for the services of the receivership." He asked some questions regarding whether or not it was to be final, or how much more work there would be, and I told him I didn't know, but so far as I knew the next dividend could be paid and the matter closed up. He said he thought that was fair and right, and made the allowance. We proceeded to Seattle, and Judge Neterer—

The MASTER.—Q. At Spokane, was anything said about Mr. Eliassen's fee?

A. Mr. Eliassen said to the Court, whatever the Court felt was right and fair would be all right. There was the same procedure that had taken place in San Francisco here. That was followed substantially.

No. 5660

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.

(IN TWO VOLUMES.)

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Appellants,

vs.

A. F. LIEURANCE, and PHILLIP A. HERSHEY, as Receivers of R. A. PILCHER CO., INC., a Corporation, Bankrupt,

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(Testimony of A. F. Lieurance.)

Recross-examination by Mr. HENEY.

Q. Did you tell Judge Webster what was allowed in San Francisco to the Receiver, and how much to the attorney?

A. I don't recall that it was so told to Judge Webster; I think it was told to Judge Bean. I don't recall that it was told to Judge Webster.

Q. Was he told that the attorneys in New York had asked for $10,000 on account?

A. I don't recall that he was, Mr. Heney.

Q. That was stated in the petition for allowance, wasn't it? [346]

A. I don't know. It might have been. Judge Neterer was more particular. When I say he was more particular, I mean he took more time and went into the matter more thoroughly. After the regular procedure, just the same as had taken place in the other courts, that is, the presenting of the statement, or the report, he questioned me at some length regarding the result obtained in the receivership. I told him the result that we had obtained. As a matter of fact, he had passed upon the work that had gone on before, and was highly pleased with the result of the sales, and commented upon the manner in which the estate had been handled, and said that it was one of the best that had come to his attention. He asked me how much I was asking for. I told him it was a matter to be left entirely to the Court. He said he understood that, but I certainly had some idea what the services were worth.

(Testimony of A. F. Lieurance.)

I refrained as long as I could, until I was asked the direct question, and felt that I had to answer as to what I would expect for the services. He also delved into the matter as to whether or not the receivership was to be closed up. I told him no, I did not believe so, but that we wanted to pay the 40 per cent dividend, and that there would be another dividend later on, and so far as I knew, the matter could be brought to a close some time, possibly, in April, or maybe earlier. He inquired about the amount of sales in that particular jurisdiction, and I gave it to him, and he took out his pencil and figured out the amount at 5 per cent on the gross sales. As I remember it, it figured up about $13,000. He said, "I don't think anybody can object to that, however, are you going to make any other application for fees?" I said, "I don't know, it depends on the amount of work that has to be done in the future." He said, "We will make this $12,000, and then if there is any other work done later on we will attend to it when the final account is heard." So that instead of figuring it at 5 per cent he took off $1,000 and made the fee $12,000. Virtually the same thing prevailed in the court in Portland, [347] Oregon. Judge Bean took considerable interest in the affair, and asked a number of questions regarding the estate, and the results obtained. He asked what had been done in the other jurisdictions, and I told him. He said he thought that was fair and equitable, and he did not believe anybody could object to that, and that he would make the order

(Testimony of A. F. Lieurance.)

for 5 per cent on the sales, and make that the final compensation so far as my compensation would be concerned. He figured the 5 per cent on the gross sales. That is how it comes to be an odd figure. That is the way these allowances were obtained. There was no breach of confidence, and no effort made to deceive the Court, and there was nothing done to influence the Court in any manner, except just as I have told you.

That is substantially what has happened in every jurisdiction. The total allowance amounted to $35,587 to me in these jurisdictions. To Mr. Eliassen they amounted to $27,500. The consideration that has been given them is just as I have told it to you, in the various courts.

Mr. HENEY.—Q. In the Western District of Washington it was left at $13,000, $1,000 to go to Gotthold, was it not?

A. Yes. I did not intentionally overlook the division of these allowances, Mr. Heney. I have told you how the division was made here in San Francisco. In Spokane, when Judge Webster made the allowance, he made it virtually on a 5 per cent basis, because the sales in that locality were approximately $100,000. He did not take his pencil out and figure it, because it is an easy matter to figure that mentally. The other ran into odd figures, and that probably accounts for it. I asked Judge Webster to make a division of that. I told him that Mr. Gotthold had done none of the work in these jurisdictions. Judge Webster said he felt the divi-

(Testimony of A. F. Lieurance.)

sion should be made, and that Mr. Gotthold should not receive as much as I. However, he had filed a bond and had taken some of the responsibility, and Judge Webster felt that he was entitled to something. I asked him if he [348] would make the division. He informed me that he would make the division at the final hearing. So that matter was left. In Seattle Judge Neterer said, "I don't know Mr. Gotthold, he has never appeared in this court, I don't know that he is entitled to any of it." I recited to Judge Neterer the conversation I had, as nearly as I could, with Judge Webster. That is where I got the idea that Mr. Gotthold had filed a bond and probably was entitled to something, since he had taken a part of the responsibility. Judge Neterer said, "Well, possibly, that is so, $1,000." I said that that was all right with me. In Judge Bean's court I told him what the amount that Judge Neterer had fixed was, and that is how that came to be fixed at $1,000 in Portland, Oregon. [349]

EVIDENCE INTRODUCED BY THE OBJECTING CREDITORS.

TESTIMONY OF WILLIAM J. HAYES, FOR OBJECTING CREDITORS.

WILLIAM J. HAYES, called and sworn as a witness for the objecting creditors, testified, in substance, as follows:

Direct Examination by Mr. HENEY.

I am an attorney at law; am admitted to the Supreme Court of the State of California, was admitted to that court about 1911 or 1912; and have been practicing ever since I was admitted.

At one time I occupied the position of Referee in Bankruptcy in the federal court. I was appointed in August, 1914; my successor was appointed, I think, in September, 1926. I am still Referee in cases which were pending before me prior to the appointment of my successor.

As such Referee in Bankruptcy, I had occasoin to determine the value of the services or fees to be allowed for Receivers in bankruptcy. I might add to that answer, in the matter of Receivers' fees and trustees' fees they are fixed largely by statute, by the Act—the Bankruptcy Act. There is a certain discretion in the referee as to additional compensation allowed.

Under that law fixing fees for a Receiver or trustee in bankruptcy, the fee of a Receiver is fixed upon a percentage basis, where he conducts the busi-

(Testimony of William J. Hayes.)

ness subsequent to his appointment. The percentage is 6% on the first $500; 4% on the next $1,000; 2% on the next $8,500; and 1% on all moneys over that; and that may be doubled in the event of special services in the conduct of the business; the question of doubling the fee is in the discretion of the Referee in Bankruptcy.

The section of the federal statute to which I refer is Sec. 48–a of the Bankruptcy Act of 1898 as amended. If I might be permitted to explain the answer. There might be some ambiguity about the amount of money handled by the Receiver, but Judge Hand of New York held that the amount of money is the amount of money not [350] turned over by the Receiver or trustee in the conduct of the business, but the profit, if there be such he has made in the turnover of the business. In other words, where the business was conducted by a Receiver and there was a turn-over of eight or nine hundred thousand dollars, and the profit to the estate was $50,000, the allowance was on the $50,000 over and above the amount of the inventory or price which was brought for—or obtained for the sale.

In other words, after all of the property is disposed of, the percentage is computed on the net result or the net amount of money produced.

As Referee in Bankruptcy, I had occasion to determine the fees of attorneys for Receivers and trustees in bankruptcy. There is no law on the subject; it is left to the discretion of the Referee in Bankruptcy.

(Testimony of William J. Hayes.)

I have read the statement of services by Edward R. Eliassen, identified in this proceeding as Receiver's Exhibit No. 2. I have read all of it. In my opinion, the sum of $25,000 would be a reasonable attorney's fee to be allowed to Mr. Eliassen for his services as atttorney for the receiver in this case. In fixing that amount, I include Mr. Eliassen's services in his effort to get his fee allowed.

Cross-examination by Mr. CROSBY.

In my experience as a Referee in Bankruptcy, I had under my supervision the West Gate Metal Products Co. I do not remember what fees were allowed the Receiver in that case. I do not recall now what fees were allowed by me to the attorneys in that matter. That matter has been pending about two years; it is still pending.

Q. Have you had laid before you at any time a statement such as the one you have in your hand now, setting forth the services of the attorneys at any time in any proceeding you have had?

A. Oh, yes; the attorneys are required to set forth their services.

Q. In the detail as you have it there? [351]

A. No; I don't think any attorney has set forth in as full detail,—telephone calls, letters received, telegrams received and sent, and so forth.

TESTIMONY OF MILTON NEWMARK, FOR OBJECTING CREDITORS.

MILTON NEWMARK, called and sworn as a witness for the objecting creditors, testified, in substance as follows:

Direct Examination by Mr. HENEY.

My profession or business is that of an attorney; am admitted to practice in all of the courts of the State of California; was first admitted in 1904; and ever since then, I have been engaged continuously in the practice of law.

I have been a member of partnerships during that period. When I was admitted I was in partnership with Walter Mansfield; I am not quite sure of the dates; I went in partnership with Nathan Frank, and then Nathan Frank and Walter Mansfield came together under the name of Frank & Mansfield, and I was a junior partner with them for a number of years. Then they separated, and I went with Mr. Mansfield, and we formed a partnership under the name of Mansfield & Newmark; that lasted about four years.

Since the time I was admitted I have been practicing more or less in bankruptcy matters and in receivership matters.

I have examined the copy of a 133-page bill of particulars, being the statement which was made by Mr. Eliassen, Receiver's Exhibit No. 2; I examined it last evening.

(Testimony of Milton Newmark.)

In my opinion, the sum of $20,000 would be a fair and reasonable compensation for the services performed by Mr. Eliassen in that matter.

(Questions by the MASTER.)

Q. Did you exclude from your consideration any of the services stated in here, Mr. Newmark?

A. No, your Honor; I read that from beginning to end, and the calculation I made is what I [352] think would be reasonable compensation for the services enumerated in that itemized bill of particulars, up to the last item, but nothing beyond it.

(No cross-examination.)

TESTIMONY OF A. B. KREFT, FOR OBJECTING CREDITORS.

A. B. KREFT, called and sworn as a witness for the objecting creditors, testified, in substance, as follows:

Direct Examination by Mr. HENEY.

I hold the official position of Referee in Bankruptcy of San Francisco; have occupied that position since 1910; prior to that time I was practicing law; was admitted to the Supreme Court of California in 1897.

I was secretary to E. H. Heacock, who was the Master in Chancery and United States Commissioner for a number of years; I was in that position at the time of my appointment as Referee.

As Referee in Bankruptcy I have had occasion from time to time to fix fees for Receivers and trus-

(Testimony of A. B. Kreft.)

tees in bankruptcy, and likewise for attorneys for Receivers and trustees.

I have read a copy of Receiver's Exhibit No. 2, which is a typewritten statement by Edward R. Eliassen.

In my opinion, from $20,000 to $25,000 would be a fair and reasonable compensation for the services performed by Mr. Eliassen in that matter.

Receivers and trustees have a maximum computed on a commission basis; that is, in bankruptcy.

Q. And, in the discretion of the referee, the amount allowed to Receivers and trustees may be double, may it not, if the services seem to warrant it?

A. Only in cases where an order of court has authorized the Receiver or trustee to conduct the business of the bankrupt, not otherwise.

(No cross-examination.) [353]

TESTIMONY OF WALTON N. MOORE, FOR OBJECTING CREDITORS.

WALTON N. MOORE, called and sworn as a witness for the objecting creditors testified, in substance as follows:

Direct Examination by Mr. HENEY.

I am out of active business now; I am looking after my own private affairs. Until recently, I was connected with the Walton N. Moore Dry Goods Co. That company was a creditor of Pil-

(Testimony of Walton N. Moore.)

cher & Co., Inc., at the time of these receivership proceedings.

I was a member of the New York Committee that was looking after the affairs of the creditors of Pilcher & Co. and I was chairman of the local committee. The local committee was confined to creditors in San Francisco. The amount of the claim of our firm was something like $30,000, or thereabouts.

I attended the meeting of the Creditors' Committee in New York City. That was after the appointment of the Receiver. William Fraser was chairman of the Creditors' Committee. I was not present at the meeting of creditors at which this committee was selected. After I became a member of the committee, I kept in touch with the chairman of the committee by very frequent exchange of letters and telegrams.

My connection with the Board of Trade of San Francisco was that my company was a member of the Board of Trade. I was not the president of the Board of Trade; I did not occupy any office in the Board of Trade.

The Board of Trade has been handling the bankruptcy matters and the receivership matters in San Francisco for the members of the Board. Practically every wholesaler and manufacturer in San Francisco is a member of the Board of Trade. The Board of Trade handles practically all of the problems of this kind for its membership.

(Testimony of Walton N. Moore.)

Q. Do you know how they are equipped for the management of it?

A. Very excellently. They have a trained force of clerks, and of adjusters, and they have a legal department.

I conducted the business of the Walton N. Moore Dry Goods [354] Company from its organization in 1906 up to last November. Prior to 1906, I was in the wholesale dry goods business in Kansas City, Mo. I came to California in 1906. I was in that business in Kansas City, Mo., ten or fifteen years. That was a corporation; I was secretary and treasurer; I had charge of the office and the finances.

With the Walton N. Moore Dry Goods Co., I kept in touch with the finances and the bookkeeping of that concern, but not with the same detail as previously. In later years, when the business got very large, I had a secretary and treasurer, and an office manager, to look after the detail of it, but I was in close touch with it all the time.

I have been interested, as a creditor, in a great many receiverships that were handled here in San Francisco; practically all of them were handled through the Board of Trade,—I think all of them.

Q. Did you keep in touch with them enough to know whether or not expert accountants were employed in connection with them?

A. I never heard of any expert accountants until this receivership, that I can recall, unless it involves some intricate question of accounting. I

(Testimony of Walton N. Moore.)

think there was one case of that kind where they called in expert accountants to decipher a very much confused set of books, and try to make something out of them. That was the only case I ever knew where an expert accountant was found necessary.

From my experience in business, and in having books kept in business, I would say that it was quite unnecessary to have an expert accountant to take care of the books of the receivership. I think you could get a very competent bookkeeper for that purpose, for about $200 a month,—not over $250.

On December 8, 1926, I received a telegram, of which a copy is now shown to me. I had just returned from New York. I had been back there and had attended a meeting of the Creditors' Committee. I had been in conference with Mr. Fraser who was chairman of the [355] committee.

(Thereupon, the telegram referred to, and which had already been offered and received in evidence was read into the record as follows:)

"Dec. 8th, 1926.

Mr. Walton N. Moore,
c/o Walton N. Moore D. G. Co.,
San Francisco, Cal.

Judge Hand last evening signed order directing receivers to pay creditors forty per cent STOP Receivers applied for partial allowance Ten Thousand to be equally divided STOP Ernst applied for partial allowance of Ten Thousand STOP Judge Hand invited suggestions from Committee

(Testimony of Walton N. Moore.)

After consultation we told him that without knowing what allowance Lieurance and his counsel would seek in Western jurisdiction Committee was not in position to make recommendation STOP Ernst tells us that he expects to apply for similar amount in final payment STOP What is your opinion on Ernst & Gotthold claims We feel Lieurance should not receive New York compensation unless figured in amount to be received on Coast STOP Please get in touch with Love see Lieurance and Eliassen find out if possible what charges will be STOP Advise results by wire because we want to include your views in recommendation to Judge Hand.

WILLIAM FRASER."

After receiving that telegram, and for the purpose of carrying out the suggestion contained in it, I got in touch with Mr. Kirk, of the Board of Trade, and also with Mr. Lieurance, and perhaps through him with Mr. Eliassen, at any rate we arranged a conference at the Board of Trade for, I think, the same day. Mr. Lieurance and Mr. Eliassen came by my office on Mission Street, and we went together to Mr. Kirk's office in the Board of Trade, where the conference was held.

I have no independent recollection of the date on which that conference was held. There was another conference later; this was the first conference. At the time of this conference, Mr. Lieurance and Mr. Eliassen came to my store and we walked over together to Mr. Kirk's office.

(Testimony of Walton N. Moore.)

On the way over, we had a discussion about the proposition of the conference. I would not undertake to divide what was said as between the time we were walking over there and what was said at the conference proper. I know that the subject was completely and [356] fully discussed. There was doubtless some preliminary discussion of the subject with Mr. Lieurance and Mr. Eliassen on the way over. How to divide it as between that period and what took place in Mr. Kirk's presence I would not undertake to do it. I know that the trend of the conversation was along the lines of this telegram that had been received, and an explanation of why the conference was to be held.

(The witness was asked to state what each of the parties said at the conference in Mr. Kirk's office, and answered as follows:)

Every man present there said at some point in the conference that the application that had been made for fees in New York was outrageously high and should not be allowed. Being in agreement on that, and Mr. Kirk and I taking the attitude with these gentlemen as being consistent with their expressions of opinion regarding the New York application, we assumed—

Mr. CROSBY.—Just a moment. That is an assumption. Let us have just what was said.

Mr. HENEY.—Yes, tell us just what was said.

A. Their statement was that there would be no trouble about reaching an agreement between the representatives of the creditors and themselves as

(Testimony of Walton N. Moore.)

to their fees, and that they regarded the amounts asked for in New York as excessive.

While I was there, Mr. Kirk dictated a telegram; he did the dictating, and we all criticized it, and finally reached an agreement as to what should be sent.

Q. The telegram is already in evidence. It is dated December 9, 1926, from Walton N. Moore to William Fraser. I will ask you to look at this, Mr. Moore, and state, if you can, what was said on the subject by the various parties present.

A. I remember that Mr. Eliassen was particularly critical of the amount asked for as attorneys fees by the New York attorneys. He said that they had not done any work that would justify such fees, [357] and that the division of Receivers' fees should be more favorable to Mr. Lieurance than a 50–50 division. That was the substance of the remarks made both by Mr. Eliassen and Mr. Lieurance. Everybody was in accord about it.

Q. Do you mean that you said the same thing?

A. Yes.

Q. Did Mr. Kirk say the same thing?

A. Mr. Kirk said the same thing. We were all in agreement. As a result of that agreement this telegram was dictated, approved by both Mr. Eliassen and Mr. Lieurance, both of them participating in its formation and it was sent in my name.

Q. This telegram, Mr. Moore, contains this statement: "I earnestly request that the question of

(Testimony of Walton N. Moore.)

such allowances be deferred for the time being until Receivers and attorneys and committee can exchange views and come to some agreement concerning gross amounts to be asked for." Can you recall what, if anything was said about that particular part of the telegram?

A. That was so as to avoid confusion and bring about a proper distribution, either an agreement on the part of the western courts to allow the whole fee to be fixed by Judge Hand, or by such division as among the various jurisdictions as would not be conflicting one with the other, and result in either an excessive or an insufficient fee.

Q. What, if anything, was said at that time about which allowances were to be deferred?

A. All allowances. We were asking specifically that Judge Hand defer making any allowances there; and, of course, there had been no application for allowances out in the west, here, that we knew of.

There was nothing said at that time about an application being made out here immediately.

Q. Was there anything said about Lieurance and Eliassen leaving to the Courts out here to fix the amount?

A. After conference with and agreement with the creditors, or an [358] opportunity to the creditors to be present and be heard. It all contemplated an agreement as between the creditors, and the receivers, and the attorneys.

On the same day that I sent that telegram or permitted it to be sent after it was formulated

(Testimony of Walton N. Moore.)

there, I wrote a letter to Mr. Fraser confirming the telegram. Mr. Kirk did not assist me in the formulation of that letter. I wrote it in my store, at the office.

Letter just referred to was offered and received in evidence and read into the record, as follows:

"December 10, 1926.

Mr. Wm. Fraser,
c/o J. P. Stevens & Company,
23 Thomas Street,
New York City, N. Y.

Dear Sir:

I arrived yesterday from New York and your telegram of the 8th received the previous day was called to my attention. Very soon thereafter I was called over the telephone by Mr. Lieurance who with his attorney desired a conference with me. I therefore telegraphed you a day message advising you of the receipt of your telegram and stating that I would more fully answer it by night-letter after the conference. This I did, as per carbon copy herewith enclosed.

It is a difficult matter for me to reach any conclusion of my own as to what would be a fair compensation to the receivers and their attorneys in the Pilcher case. What contact I have had with it with the New York attorneys involved has left me with the impression that it will be their desire to get every dollar that the Court and the creditors will allow them to take. I do not think that it now

is the time to fix the final compensation and inasmuch as nearly all of the work has been done in the ancillary jurisdictions it seems to me that the judges of these courts are better able to determine the value of the services rendered than Judge Hand could be.

I had a conference yesterday with Lieurance and his attorney, Eliassen, together with the attorney of the San Francisco Board of Trade. I was impressed with the fairness of Lieurance's attitude. He expressed a willingness to submit the entire matter to the judges of the ancillary courts to fix the fees. Nearly all of the work has been done out here where the property was located and the results produced by Lieurance have been very creditable. It seems to me that a statement of facts might be prepared by the attorneys of Mr. Lieurance for submission to each of the ancillary courts, which could have the approval of the creditors as to its correctness, which could be submitted to each of the courts with the request that the judges thereof fix the compensation for the work done in his jurisdiction. When these allowances have been made, the whole could then be submitted to Judge Hand with a similar statement and he can then make such additional allowance, if any, as he thinks proper. I am in hopes that correspondence between the receivers and the attorneys may result in some mutual under-

standing which will avoid conflict, giving them what is their just due and no more.

Very truly yours,
CHAIRMAN OF THE BOARD.

WNM/WH." [359]

(It was stated by counsel that the "night-letter" referred to in the foregoing letter, and a carbon copy of which was inclosed with the letter, was the telegram of December 9, 1926, dictated by Mr. Kirk in the presence of Mr. Moore, Mr. Lieurance, and Mr. Eliassen, as hereinbefore stated; and counsel for the objecting creditors stated that the letter was introduced "partly to show Mr. Moore's understanding of what the telegram was intended to convey.")

(A letter from William Fraser to Walton N. Moore, dated December 9, 1926, was then introduced in evidence and read into the record as follows:)

"New York, Dec. 9th, 1926.

Mr. Walton N. Moore,
c/o Walton N. Moore D. G. Co.,
San Francisco, Cal.

Dear Mr. Moore:

We sent you telegram as per enclosed copy relative to the desire of the receivers to be paid $10,000 as a partial allowance in New York City, which sum we are advised, has been agreed by the receivers should be equally split with the understanding that any allowance that Lieurance gets in the West should be likewise equally divided.

Mr. Ernst also made application for a partial allowance of $10,000.00, and in answer to a question

of one of the Committee members stated that this was predicated on a further application for an additional and final allowance later on of $10,000.00 more.

The Committee does not know how to advise Judge Hand because we do not know what will be the amount of the similar expenses in the West. We do think in both instances the amount asked for is too high. We, furthermore, do not feel that Lieurance should be counted in the fee in New York unless any amount he receives here should go towards reducing his claim in the Western Jurisdiction.

As a spokesman for the Committee I told the Judge that the Creditors Committee wanted to be fair, and felt that both the receivers and their counsel should receive compensation commensurate with the work that they had done. Judge Hand, himself, apparently feels that he has not enough information along the lines just suggested, regarding the possibility of Lieurance and Eliassen's fees, to enable him to act in the manner in which he would like to do.

Ernst told me over the telephone yesterday that he had received a wire from Lieurance stating that as far as he was concerned he did not intend to ask for any definite amount of compensation, but intended to leave it absolutely to the fairness of the Judge. I do not feel that I wish to criticize Mr. Lieurance's attitude because I have a very high regard for his ability and other qualities about

which I have been so favorably informed, but I do feel that he should appreciate the Committee's situation and their desire to be of service not only to the Court, but to the creditors as well. He might very suitably go into this matter with you and Mr. Love and arrive at some definite conclusion, which will help us to properly fulfill our obligations to Judge Hand. [360]

It is not usual for a Judge in Judge Hand's position to ask for recommendation from the Creditors Committee. He is under no legal obligations to do so, and in fact in this and other jurisdiction it is most unusual for a Judge to permit the Creditors Committee to have any hand in the proceedings by which he reaches his ultimate decision.

We, therefore, feel that if Mr. Lieurance knew these circumstances and gets the proper picture of the sympathetic attitude of the New York members of the Creditors Committee, that he will be willing to proceed along the lines which I have indicated in this letter and in my telegram.

I would also like very much to have you express yourself very fully regarding the fees which have been asked for, both by the co-receivers and by Mr. Ernst. While we wish to be fair, we think they are too high.

Will you please give me the benefit of your advice in the situation?

Sincerely yours,

Enc. WM. FRASER."

(Testimony of Walton N. Moore.)

Q. When you got that letter, Mr. Moore, what did you do?

A. My recollection now is that I telephoned Mr. Lieurance at his office and learned that he and Mr. Eliassen had gone north. I took this letter to Mr. Kirk and advised him of the information that I had received that these men had gone north. I said, "It seems very strange, I don't know of any necessity for their going North, except on the matter of their fees, and notwithstanding their agreement made with us here the other day I have my suspicions about it, and we ought to be represented at any application for fees they are going to make; the fact that they have left town immediately after that conference with us in the manner in which they have makes me suspicious of their good intentions." Mr. Kirk could hardly agree with it, but finally sent a telegram. This is the telegram that was sent that day.

Q. This telegram is addressed to "To E. R. Eliassen or A. F. Lieurance, Hotel Washington, Seattle, Washington." Where did you get the address?

A. I think that was given us by the secretary or by the stenographer in Mr. Eliassen's office. That is my recollection of it.

(Counsel for the objecting creditors then called attention [361] to the fact that the telegram which was put in evidence "was addressed to these gentlemen on the train, certain seats, which seats had been secured for them by the hotel; thereupon, counsel for the objecting creditors temporarily sus-

(Testimony of A. F. Lieurance.)

pended the direct examination of Mr. Moore, and propounded certain questions to Mr. Lieurance, witness for the plaintiffs.)

TESTIMONY OF A. F. LIEURANCE, FOR PLAINTIFFS (RECALLED—CROSS-EXAMINATION).

Cross-examination of Witness LIEURANCE Resumed by Mr. HENEY.

I don't know whether this telegram was forwarded to us by the hotel or not; but it was handed to us by the conductor. I have the original telegram that was handed to me; it is the one that is in evidence here. (The Master directed attention to the fact that it was read in evidence but that the telegram was not "here physically.")

TESTIMONY OF WALTON N. MOORE, FOR OBJECTING CREDITORS (RECALLED).

Direct Examination of Mr. MOORE by Mr. HENEY (Resumed).

This is a carbon copy of the telegram, written in the office. I did not know the seats that they were going to occupy on the train. I didn't know they were on the train. I supposed they were in Seattle. (Questioned by Mr. CROSBY.)

Mr. Kirk signed that telegram but I was present when it was sent; Mr. Kirk sent it.

Direct Examination of Witness by Mr. HENEY (Resumed).

Mr. Kirk dictated that telegram while I was there

(Testimony of A. F. Lieurance.)

in his office, and as a result of the talk that I had with him at that time.

TESTIMONY OF A. F. LIEURANCE, FOR PLAINTIFFS (RECALLED—CROSS EXAMINATION).

Cross-examination of Witness LIEURANCE by Mr. HENEY (Resumed).

I think the telegram came to us through the hotel. We had been there over night. The porter, no doubt, had gotten our reservations for us. My office here knew the hotel at which I was going to stop. I did not know what seats in the car I was going to occupy. The hotel undoubtedly did that.

(The telegram referred to was then introduced in evidence and read into the record as follows:) [362]

"December 15, 1926.

To E. R. Eliassen or A. F. Lieurance, Hotel Washington, Seattle, Wash.

In view of communication received by Walton Moore from Frazier Chairman New York Creditors Committee, it is highly desirable that you should not apply for receiver's allowances or attorneys fees in western jurisdictions until whole subject matter can be again discussed here upon your return.

JOSEPH KIRK."

TESTIMONY OF WALTON N. MOORE, FOR OBJECTING CREDITORS (RECALLED).

Direct Examination of the Witness MOORE by Mr. HENEY (Resumed).

Referring to the telegram dated December 16, 1926, from Mr. Lieurance to myself, telling me that the work had been completed and what had occurred in the north, and which telegram has already been read into the record: I received that telegram on December 16; I assume it was that date.

Before receiving that telegram, I had not received any information from any source, that the court here in San Francisco had already made an allowance to Mr. Lieurance and Mr. Eliassen. I had not received any information from any source that the court at Spokane had done so,—or at Seattle, or at Portland.

When I got that telegram I sent a telegram to William Fraser on that same day. I also wrote a letter to Mr. Lieurance on the same day, and enclosed a copy of this telegram to William Fraser.

(Thereupon, the letter and telegram last referred to were introduced in evidence and read into the record as follows:)

"December 16, 1926.

Mr. A. F. Lieurance,

Central National Bank Bldg., Oakland, Calif.

Dear Sir:

I was astounded at the contents of your telegram of even date from Portland concerning allowances to receivers and attorneys in this Pilcher case. I know of nothing that will more clearly express my feeilng on this subject than the telegram which I have sent to Mr. Wm. Fraser, Chairman of the Creditors' Committee in New York, of which I am enclosing herewith a copy.

To put it mildly, I am astounded at the action of yourself and Mr. Eliassen in proceeding with your applications in this matter without any agreement with creditors and without creditors being heard by the Court.

WNM/WH Yours truly,"

The telegram reads as follows: [363]

"December sixteenth 1926

William Fraser, c/o J. P. Stevens Co.,

23 Thomas Street, New York City

Telegram received Stop To my utter astonishment I received following telegram today from Receiver Lieurance at Portland Quote Work completed here this morning Stop Orders obtained all jurisdictions pay forty percent dividends Stop Allowance to Attorney California Ten Thousand Spokane Twenty Five Hundred Seattle Five Thousand Portland Ten Thousand Total Twenty seven

(Testimony of Walton N. Moore.)

Thousand Five Hundred Stop Allowance to Receivers California Ten Thousand divided seventy five and twenty five percent Spokane Five Thousand division to be made at final hearing Seattle Thirteen Thousand divided Twelve and one Portland Fourteen Thousand Five Hundred divided Thirteen five and one Total Forty two thousand five hundred Stop Phoned above information to Mr. Love this morning Stop Will be home Saturday End Quote Receiver Lieurance and his attorney were present when telegram of December Ninth to you was prepared and consented thereto Stop In view of this fact we consider applications for allowances in Western Jurisdiction which were made without any notice to Creditors' Committee here as being unwarranted and in violation of understanding stated in telegram of December ninth. Stop We contemplate making immediate application to Western Courts to set aside the allowances as excessive and exorbitant and to give creditors full opportunity of being heard with respect to the allowances Stop Will your committee join in making this application or request to Western Courts and bear their share of expenses and fees incident thereto.

WALTON N. MOORE."

Direct Examination of the Witness MOORE by Mr. HENEY (Resumed).

On the same day, I wrote a letter to Mr. Fraser, and this is a carbon copy of it. I don't know whether I sent a copy of that to Mr. Lieurance.

(Thereupon, the letter last mentioned was introduced in evidence and read into the record, as follows:)

"December 16, 1926.

Mr. Wm. Fraser, Chairman,
J. P. Stevens & Co., 23 Thomas St.,
New York City, N. Y.

Dear Sir:

I am enclosing herewith a copy of a night-letter just sent you. It is so complete in itself that it leaves but little to be said here.

The action of Lieurance and his attorney Eliassen in appearing in these various courts without any agreement with the creditors is astounding to me and I did not know of it until I received Lieurance's telegram today which is quoted in mine to you.

The only thing omitted in the telegram which has already been sent is an explanation to you of the division of receivers allowances referred to in Lieurance telegram. In our recent conference he contended that he was entitled to more compensation than Gotthold and he has secured an order from the Court dividing the [364] receiver's fee between himself and Gotthold as indicated by his telegram. I am sending you an additional telegram in explanation of this, of which a copy is also enclosed.

You will note that the total of the allowances made is $70,000, which is not final and this will be in addition to whatever allowances are made in the New

(Testimony of Walton N. Moore.)

York Courts. I hope you and the Committee will agree with me that this action should be contested.

WNM/WH Yours truly,"

Direct Examination of Witness MOORE by Mr. HENEY (Resumed).

I recall the second conference between Mr. Kirk and myself, and Mr. Lieurance and Mr. Eliassen, and which was after these allowances had been made, referred to in the telegrams just read into the record. I cannot fix the exact date of that conference. It was very soon after December 16. It occurred in Mr. Kirk's office. Mr. Kirk, Mr. Eliassen, Mr. Lieurance and myself were present.

Q. State what occurred, and what was said there by each of the parties, the substance of it if you cannot give the exact words.

A. We asked an explanation of why, in the face of the agreement we had had at the previous conference, these men had slipped off and without our knowledge had secured an allowance from the Courts without any representation of the creditors, and far in excess of any amounts that we had contemplated, or that they, themselves had expressed themselves as thinking sufficient in the case of the application before Judge Hand in New York. There was much said there, Mr. Heney, some of it would not bear repetition, some things that I said would not bear repetition.

Q. That is to say, all parties got mad?

(Testimony of Walton N. Moore.)

A. I think I expressed myself and my conviction of their actions about as freely as I ever did anything. I told them, I think, it was crooked.

There was something said about reducing the amount. We tried to get them to nullify their action and start all over again. They would not agree to that. Then we tried to get them to reduce the amount of the allowances. [365]

Q. What was said about reducing it?

A. There was a lot of conversation about what they were entitled to. It became evident that there could be no agreement. They said that they had gotten these allowances and they were going to hang on to them.

Q. Who said that?

A. Mr. Eliassen. We told him that we would make a contest of the matter, we would make a statement of the facts to the Court and ask for a revision.

I do not recall anything that was said about having any further conference. On that same day, after this second conference, I sent to Mr. Fraser the telegram, a carbon copy of which is shown to me.

Referring to the second conference above mentioned: Mr. Lieurance said he would take the question of the revisions of these allowances under consideration, in the light of our attitude, and he was to communicate with Mr. Kirk.

The telegram to Mr. Fraser above referred to, was sent by me the same day upon which the second conference was held, I cannot recall the hour of the day.

(Testimony of Walton N. Moore.)

(The telegram was mentioned as December 20; and the Master observed that it conformed with Mr. Eliassen's statement, and fixed the date of the second conference as being December 20; to which counsel for the objecting creditors assented.)

The telegram last mentioned was offered and received in evidence, and read into the record, as follows:)

"December Twentieth 1926

William Fraser, c/o J. P. Stevens Co.,
23 Thomas Street, New York City.

Telegram eighteenth received Stop Receiver Lieurance and Attorney Eliassen sought interview with me today regarding their allowances and I notified them that unless allowances ordered were immediately set aside creditors committee here would employ competent counsel and petition courts to set them aside Stop They have asked until tomorrow morning to answer when I will again wire.

WALTON N. MOORE."

Q. Did you get any answer the following morning, Mr. Moore? [366]

A. Well, I cannot remember about that. If it came it came through Mr. Kirk. The negotiations after that were carried on by Mr. Kirk. I do not recall.

Q. In that conference which you have just been testifying about, did either Mr. Lieurance or Mr. Eliassen state that Mr. Kirk knew, that they had told him that they were going to make application for allowances?

(Testimony of Walton N. Moore.)

A. No, not that I know of, because I know he did not know of it.

Mr. CROSBY.—I move to strike out that latter part of the answer as the conclusion of the witness.

The MASTER.—The last part of the answer will go out; the rest of it stands.

Mr. HENEY.—Q. Can you state positively one way or the other, did either Mr. Lieurance or Mr. Eliassen make that statement in the presence of Mr. Kirk, that Mr. Eliassen or Mr. Lieurance had told him in advance that they were going to make those applications for allowances, or that in substance?

A. They did not make that statement in my presence.

Q. Were you present during that entire conference? A. Yes.

The MASTER.—This is the second conference, is it?

Mr. HENEY.—Yes, the second conference, your Honor.

Cross-examination by Mr. CROSBY.

Q. Mr. Moore, I am showing you what purports to be a copy of the telegram of December 9, that you sent to William Fraser care of J. P. Stevens Co. Beginning the fourth from the last line, I call your attention to this: "As you now know from yesterday's telegram from Lieurance to Gotthold and attorneys McManus, Ernst & Ernst, Receiver Lieurance and the attorney in the ancillary jurisdictions

(Testimony of Walton N. Moore.)

intend leaving amount of allowance to the discretion of ancillary courts.'' Did you dictate that?

A. No.

Q. That was done by Mr. Lieurance, wasn't it?

A. That was dictated in Mr. Lieurance's presence by Mr. Kirk. We [367] all participated in the dictation of this telegram, made suggestions here and there. I think that was included in view of Mr. Lieurance's statement to us that he had been in communication with Gotthold and McManus.

I think that latter part of the telegram was suggested by Mr. Lieurance.

I have been a member of the eastern Creditors' Committee, in this matter, from its inception. My firm is a member of the San Francisco Board of Trade.

I was chairman of a Creditors' Committee here, composed of all of the San Francisco creditors, who were members of the San Francisco Board of Trade, —a group of creditors having to do with this particular Pilcher matter. I don't remember now the personnel of that committee. It is the practice of the Board of Trade to call a meeting of creditors when a thing like this first occurs; at that meeting a committee is appointed to handle the matter. That committee is usually composed of the three, or four, or five largest creditors; I was the chairman appointed in this case.

Of course, I was interested in the matter of the claim of my company; and, likewise, was commonly interested as a member of the Committee in the

(Testimony of Walton N. Moore.)

general welfare of the estate. I may say this, however, that at the time of these matters here—this correspondence and these conference referred to—I no longer had any personal interest, any personal financial interest in it. At that time I had sold my business and had no personal financial interest in the result of the matter. I was only acting for the creditors.

I did not go to New York on account of the Pilcher business; I was in New York on other business, and while there attended a meeting of this committee.

I don't recall that I knew anybody connected with the Pilcher Company except Pilcher. On this particular trip to New York I met Brownstone who was a large stockholder. I took up personally with [368] him the claim of my institution. He had previously guaranteed it; I would have to have the books to refresh my memory as to the time when he guaranteed it; it was along in the late summer or early fall of 1926. It was not after the inception of the receivership; it was before the receivership. I have papers at the office which will determine definitely the date.

I don't remember whether, before I went to New York, I received from Mr. Lieurance word as to the time of a meeting of the eastern creditors; I may have done so; I learned of it after I got there through Mr. Fraser.

It is my best recollection now, that on this occasion of the meeting on the 9th of December in the

(Testimony of Walton N. Moore.)

office of the Board of Trade, I thought I remained in that meeting right up to the end. I understand there has been some evidence here to the contrary. My recollection is that Mr. Lieurance and Mr. Eliassen and I went out together and went down in the elevator together. That is my best recollection.

Q. In the second conference that you spoke of, is it not a fact that Mr. Eliassen and Mr. Lieurance suggested to you a revision of these allowances, and did you not say to Mr. Eliassen and to Mr. Lieurance "The time has passed for that now," or words to that effect?

A. No, I don't remember saying that.

Q. Would you say you did not say it?

A. I would say I didn't because that was not my point of view. I was anxious certainly to get a revision of these allowances.

Q. Would you say that they did not take up with you or attempt to take up with you the question of a revision of allowances?

A. It was taken up, it was discussed there; there is no question about it.

Q. Did you say that they refused to revise them?

A. They refused to do whatever we wanted done at the time. I don't remember just what our proposition was. They took our proposition under advisement and were to let us know the next day. [369]

Q. Was not your proposition one definite propo-

(Testimony of Walton N. Moore.)

sition, to nullify and set aside the allowances; Was not that your proposition, definite and complete?

A. Well, it certainly was at one time. I don't remember whether there was any modification of it. I don't remember what the modification may have been.

Redirect Examination by Mr. HENEY.

Q. Mr. Moore, on December 9, while you were in Mr. Kirk's office, did Mr. Eliassen at any time say that he intended to go out to Court here in San Francisco the next day and ask for an allowance for the Receiver's fees and the attorney's fees?

A. He did not.

Q. Did Mr. Lieurance make any such statement?

A. He did not. We had no idea that he contemplated anything of that kind.

Recross-examination by Mr. CROSBY.

The claim of our company against the Pilcher Company has not been paid in full to my knowledge. I don't know whether it has been or not; I am not in touch with things there now. But I think I can answer that now; we were not paid in full up to about a week or ten days ago; I was told it was not; in fact, I was asked to see him (Brownstone) when I go to New York; I am expecting to go to New York next week.

TESTIMONY OF JOSEPH KIRK, FOR OBJECTING CREDITORS.

JOSEPH KIRK, a witness called by the objecting creditors, was unable to attend because of serious illness; and the parties entered into a stipulation, in open court, embodying the facts to which Mr. Kirk would testify if present, and with the further stipulation that such statement of facts should be treated and considered as having the same effect as if Mr. Kirk had been present and had testified under oath to such facts. The proceedings upon the subject were as follows:

Mr. HENEY.—Your Honor, and Mr. Crosby, I am informed that [370] Mr. Kirk is quite ill, that he had an attack of angina pectoris last night, and that the doctor says he cannot come down here. I even thought that we might perhaps go out to his house and take his testimony out there, but I do not know that we can even do that.

Mr. CROSBY.—From what you said to me, Mr. Heney, I do not think it would be a safe thing to do, to go out to his house and disturb him, under the conditions.

Mr. HENEY.—Then I will avail myself of the offer you so generously made a while ago, Mr. Crosby.

Mr. CROSBY.—We made this suggestion, your Honor, that if Mr. Heney will state to us what he proposed to show by Mr. Kirk we might possibly be able to concede that if Mr. Kirk were here he

would so testify. That will save the delay that would necessarily be caused by reason of his illness in waiting for him to come down here. Could you make up just a little memorandum of the points, Mr. Heney?

Mr. HENEY.—Yes. I can state now from recollection that Mr. Kirk insists that there was not any talk in that conference on the 9th of December, there was not any talk about the petition for allowances being made on the following day, or at all, until after there had been a conference in which the creditors, and the attorneys, and the Receivers should endeavor to agree upon some sum; and that the talk about going out to court was entirely about the 40 per cent dividend and the order that Mr. Kirk wanted in regard to creditors.

In regard to the part that Mr. Moore testified to, as to the conversation leading up to that telegram, I will have to look up my notes on that subject, I haven't them here, because Mr. Kirk, being an attorney, I did not think I would have to have any notes to examine him from, and I could not state that accurately enough now.

Mr. CROSBY.—You state that if he were here his testimony would be along the line of Mr. Moore's statements, and tend to [371] support Mr. Moore's statements with relation to what occurred there at that meeting?

Mr. HENEY.—Yes. I remember about that telegram that they sent north, when Mr. Moore brought Mr. Kirk the letter from Mr. Fraser and

showed it to him, that Mr. Moore stated that he had learned through telephoning over to Mr. Lieurance's office that Mr. Lieurance and Mr Eliassen had gone north, and that they were at the Washington Hotel, and that Mr. Moore expressed himself as Mr. Moore has testified here, that he was suspicious that they were trying to get attorney's fees and Receiver's fees, but that he, Kirk, did not think that they were attempting or would attempt to have an allowance made for attorney's fees or Receiver's fees, because he did not think they would violate what he understood to be the agreement.

Mr. CROSBY.—You say that Mr. Kirk goes so far as to admit that Mr. Eliassen and Mr. Lieurance were to be in court the next morning to present the request for the dividend and to file the stipulation that Mr. Kirk had sent to Mr. Lieurance, or to Mr. Eliassen, and to procure an order thereon?

Mr. HENEY.—I recollect distinctly about the stipulation and the order thereon, that they were to go out there for that. I am not dead sure about the 40 per cent dividend. It is running through my mind that he said something to me about the 40 per cent dividend, but I cannot recollect just what it is.

The MASTER.—I don't think that particular matter is of great importance. I should assume that the creditors were anxious to get the dividend as early as possible.

Mr. HENEY.—Yes, that is undoubtedly so.

(Testimony of Edward R. Eliassen.)

Mr. CROSBY.—Your Honor, we will stipulate that if Mr. Kirk were here the testimony that he would give would be what Mr. Heney has now related he would state if he were here. We accept that and permit it to go into the record in this manner by reason of Mr. [372] Kirk's inability to be present, due to his illness, and in the interest of time, and a desire to get this matter before your Honor at the earliest possible moment.

The MASTER.—Is that satisfactory?

Mr. HENEY.—Yes, that is satisfactory, your Honor.

TESTIMONY OF EDWARD R. ELIASSEN, FOR PLAINTIFFS (RECALLED—FURTHER CROSS-EXAMINATION).

EDWARD R. ELIASSEN, a witness for the plaintiffs, was recalled by counsel for the objecting creditors and testified, in substance, upon: Further Cross-examination by Mr. Heney.

The letter now shown me is a carbon copy of a letter addressed to me, dated November 24, 1926. I cannot state just when I received that, Mr. Heney, but I have no doubt I received it. I do know that accompanying that letter was a draft of a suggested stipulation which he desired to have signed by Mr. Lieurance and by myself, stipulating that an order might be obtained herein in this court finding that the filing of certain creditors' claims at New York

(Testimony of Edward R. Eliassen.)

would be deemed as having been filed with the Receivers here. That is my recollection of it.

On the day that we went over to Mr. Kirk's office, on December 9th, and had that conference, I brought with me that letter and that stipulation, and the proposed form of order. When the telegram had been finally written and Mr. Moore had left—Mr. Moore left before the meeting was over, and suggested that Mr. Kirk could sign his name to the telegram; he did not wait to see the final finished product. I then took out this stipulation and draft of order; and told Mr. Kirk that the stipulation was agreeable to us, and the form of order was also agreeable to us, and I said I would sign that right here. That was done. Then we had the further conversation that I testified about, and suggested that so long as he had said he would not be there unless I wanted him—that means in [373] *in* court the following morning—I would take that stipulation out and ask the Court for an order, and would see that the stipulation and the order were filed. He then thanked me and said that that was fine. My recollection is I presented that to Judge St. Sure and obtained the order, and filed both the stipulation and the order.

(After some discussion between the Court and counsel for the objecting creditors as to whether Mr. Kirk was the attorney of record, the witness further testified:)

I don't recall if he was the attorney of record.

(Testimony of Edward R. Eliassen.)

We knew, of course, and it was well-known, that he represented certain creditors.

(Copies of the stipulation and the order referred to were shown to the witness, who further testified:)

I have just examined the carbon copy of the order based upon the stipulation, and I am satisfied that the original is the instrument that I took out with the stipulation.

(The Court then suggested that the copies of the documents just mentioned were not necessary, because the originals were on file in the case. Thereupon, the letter above mentioned by the witness was introduced in evidence and read into the record as follows:)

"November 24, 1926.

Edward R. Eliassen, Esq.,
Attorney at Law, Central Bank Building,
Oakland, California.

Dear Sir: Re R. A. Pilcher & Co.

In this matter referring to telephone conversation had with you a few days ago about the presentation or filing of the claims we represent, I am enclosing the suggested form of stipulation which I think should be executed in duplicate by Receiver Lieurance and yourself as his Attorney and return to me in due course for signing as Attorney for the listed creditors, whereupon one of the agreements will be sent to you for your files.

(Testimony of Edward R. Eliassen.)

The proposed order of court, as you will see follows the wording of the stipulation.

Yours truly,

JK/BS ——————————,

Attorney."

Further Cross-examination of the Witness ELIASSEN by Mr. HENEY (Resumed).

Referring to a carbon copy of a letter dated December 16, [374] 1926, addressed to me, from Joseph Kirk: I received the original of that letter.

(The letter last mentioned was introduced in evidence, and read into the record; the date of the letter is December 16, 1926, and the body of the letter reads as follows:)

"E. R. Eliassen, Esq.,
Attorney at Law,
Oakland, California.

Dear sir: Re: R. A. Pilcher Co.

In this matter, the enclosed copies of telegrams exchanged between Mr. Moore and Mr. Fraser explain themselves.

I am absolutely astounded, in view of the contents of the telegram of December 9th that you and Receiver Lieurance should have gone to the different Courts in the absence of any representative of creditors and secured enormous allowances and fees to him and to you.

That telegram contained unmistakable language to the effect that the question of allowances should be deferred until the Receivers and Attorneys and

(Testimony of Edward R. Eliassen.)

Committees could exchange views and come to some agreement concerning the gross amounts to be asked for.

Very truly yours,

JK:D _____,

Attorney."

That letter must have reached my office, while I was still absent in the north. Mrs. Williams was employed in my office at that time, and that is her signature upon that acknowledgment. As soon as I got back, she showed me the letter from Mr. Kirk.

(The "acknowledgment" above mentioned, was introduced in evidence, and read into the record; it is on the printed letter-head of Mr. Eliassen and reads as follows:)

"December 18th, 1926.

Board of Trade,
444 Market Street,
San Francisco, California.

Dear Sir:

Your letter of December 16th received. Mr. Eliassen is expected back shortly to his office and all matters will receive his prompt attention.

Yours very truly,
J. D. WILLIAMS,
Secretary."

I don't recall that there was a written reply to that letter. I know that we telephoned to Mr. Kirk and arranged an interview. [375] This was after we returned.

(Testimony of Edward R. Eliassen.)

Q. Were you ever employed as an attorney for a Receiver before this occasion, Mr. Eliassen?

A. No, only in bankruptcy matters.

Q. These attorneys in the north, whom it is averred here were to be paid $2600 by you, what were they employed to do?

A. They were to act as local counsel. Mr. Stott was to take care of all the things that required immediate attention, and the things that it was thought it would not be worth my while to go up to attend to.

Q. That was during the entire period?

A. Oh, yes. Nelson Anderson was employed to resist an order to show cause on the claim of C. W. Kelly. He represented me in other matters. His fee was only nominal; I paid him $100. The man in Spokane was paid his bill, it was only $50. I have not paid Plowden and Stott. Mr. Stott represented me in a number of matters.

While I was in Seattle, at the time I was about to file my petition for allowance for Receiver's fees and attorney's fees, and before going to court, I had a talk with Mr. Love.

Q. Did Mr. Love tell you that in his opinion $75,000 for all the attorneys and both Receivers in all jurisdictions, a total of $75,000, was in his opinion as much as it ought to be?

A. I think he did mention that, Mr. Heney. I recall at the same time that we told him we were going to go into Judge Neterer's court at two o'clock in the afternoon and asked him if he would be there. I might say, too, Mr. Heney, that he felt

(Testimony of Edward R. Eliassen.)

that the fees asked for in New York were out of all reason. We discussed at some length the entire administration and the fact that the stores were all on the coast, and the business of the receivership was being done here. Mr. Love did the greater part of the talking, I think.

Q. Do you know from your personal experience that the fees of attorneys, and of office assistants, and of rents, and attorney's fees, and desirable quarters in New York City, all cost considerably higher than in San Francisco and in Oakland? [376]

A. No, I don't know that.

Q. Do you know as to attorney's fees?

A. No, I do not. I have an idea that attorneys charge enough there in New York.

I know nothing about rents there. My idea has been for some time that the rents in Oakland are very high. I know that very desirable space here in San Francisco can be gotten for less that it can be gotten in desirable buildings over there.

I don't know anything about New York. I have been there merely passing through either on business or on pleasure.

Q. An effort was made on behalf of the creditors to reach an amicable agreement as to the total fees to be paid to yourself and Mr. Lieurance, was there not, after the matter of the reduction of those fees was consummated, and during those negotiations?

A. Yes. I said to you, as you will recall, that I wanted harmony, and did not like any friction of

(Testimony of Edward R. Eliassen.)

any kind, and that I was always wililng to meet people across the board and try to adjust matters, and that is still my statement.

Q. That is correct.

A. I try to practice law that way, Mr. Heney, I try to keep people out of court.

Q. Did you also say that Mr. Lieurance was somewhat—I don't mean in your exact language, Mr. Eliassen, but the effect of it was that he was somewhat obdurate about it, that he did not want to negotiate?

A. I said I did not believe that he would go as far as I would. That was the substance of it. As a matter of fact, I did bring him over to your office. You will recall that.

Q. Yes.

A. I said I was satisfied he would be glad to meet you and would be glad to talk it over.

Q. And I made efforts right within the last week of your going up to Portland on the final account, and within two days before you left, to have you get him over to my office again, if possible, and to see if we could not reach an agreement.

A. Yes, you asked me that, and I said I was satisfied it had gone [377] so far that we could not get him over.

Redirect Examination by Mr. CROSBY.

Q. At that meeting on December 9, that has been referred to here, where you, and Mr. Lieurance, and Mr. Moore, and Mr. Kirk were present, was any-

(Testimony of Edward R. Eliassen.)

thing said by anyone about preparing any statements of the amount of allowances to be asked for, which statement would be submitted to or taken up with the creditors and by them agreed upon?

A. No, sir.

Mr. Moore did not leave that building with myself and Mr. Lieurance on that occasion. I am very positive about that. Mr. Moore left before the telegram was sent. The stenographer Mr. Kirk was using, brought in several drafts, and amended drafts of the telegram, and when the final draft was dictated there were very few and very slight changes to the final draft, and Mr. Moore then took out his watch and said, "Well, now, that is all right, it is agreeable all round, I have to hurry, and you, Mr. Kirk, can sign my name to that telegram," and he left. It was after that that I then opened my brief-case and brought out this stipulation and this order which has been referred to, and which Mr. Kirk desired to have signed concerning the claims.

It was after Mr. Moore left that I had the conversation with Mr. Kirk that I have related concerning which he has not agreed.

The understanding was that the Courts were to fix the amounts of the allowances. We wanted to know when we should seek them, and we were told by Mr. Kirk the sooner the better. He wanted to know when we could do it, and he suggested that we go out to court the following morning. Then I asked him if he wanted to be there, and he said he would be there if I desired his presence, but he did

(Testimony of Edward R. Eliassen.)

not think it was necessary. It was then that I volunteered to take the stipulation out with the draft of the proposed order and have the two documents signed and filed. He also asked when we could go north, and we said we could arrange to do that as quickly after that as possible. [378]

(Counsel for the objecting creditors then stated that in view of the above testimony of the witness, he desired to show it to Mr. Kirk after it was transcribed with leave to bring in Mr. Kirk's statement in regard to it; counsel for the plaintiffs stated that there was no objection to that; and thereupon the witness testified further upon the subject as follows:)

I will state here that when we had that interview after our return from the North he denied absolutely that that took place.

(It was then stipulated between counsel for the respective parties that if Mr. Kirk were present he would deny the matters to which Mr. Eliassen has just testified; in other words that Mr. Kirk would corroborate Mr. Moore's testimony.

Thereupon, the Master inquired what would be Mr. Kirk's testimony as to Mr. Moore's presence. Counsel for the objecting creditors stated that he did not know; the witness Eliassen stated that he did not think Mr. Kirk would corroborate Mr. Moore on that point; that he thought Mr. Moore was mistaken as to that.

It was then stipulated between the parties that Grant H. Wren, one of the counsel for the objecting

(Testimony of Edward R. Eliassen.)

creditors would ascertain Mr. Kirk's statement on the subject and that the same would be communicated to the Court and counsel, and become a part of the record in the case.

Thereafter, pursuant to this stipulation, Mr. Wren reported to the Master and to the attorneys for the respective parties, the result of his discussion of the above matter with Mr. Kirk, and the same became a part of the record of the case, as follows:)

"Pursuant to telephone conversation had with you today, I wish to advise that on Thursday evening, October 20th, 1927, I discussed this case with Mr. Kirk and told him the substance of Mr. Moore's testimony relative to conference held in Mr. Kirk's office on December 9th, 1926.

I particularly mentioned that Mr. Moore had testified that he did not leave prior to the conclusion of the conference; that he and Mr. Eliassen and Mr. Lieurance left at the same time and went down in the elevator together. At that time Mr. Kirk stated, that Mr. Moore's testimony was in accordance with his (Mr. Kirk's) recollection. It should therefore, be stipulated that Mr. Kirk's testimony would corroborate that of Mr. Moore's with regard to this conference in all respects. [379]

Copy of this communication is being sent to Attorney Eliassen and to Mr. Francis J. Heney."

(Thereupon, the following proceedings took place:)

(Testimony of Edward R. Eliassen.)

Mr. ELIASSEN.—There was one other matter that I wanted to bring up.

Mr. CROSBY.—With your Honor's permission, and also Mr. Heney's may Mr. Eliassen make some further statement here?

The MASTER.—Yes.

Mr. ELIASSEN.—It has just slipped my mind. I made a note of it in my book. Mr. Moore said yesterday, as I recall it, that an attempt was made at this meeting, after our return from the North, to get us to revise the amounts of the allowances—I have used his language in my notes. He is mistaken there. I am positive of that, because several times we tried, or I tried to state that I would like to know what figures would be agreeable to them on account of allowances, and both Mr. Kirk and Mr. Moore, who were very angry at the time, said, in substance, that the time for discussion of the reduction of the allowances or for the decrease of the allowance had passed, and that all that they would consider was a stipulation setting aside the orders. You will recall, Mr. Heney, that I mentioned that to you at the very outset of our first meeting.

Mr. HENEY.—Yes, I do recollect you said that. I recollect that your statement of it, and Mr. Kirk's statement of it were widely apart.

Mr. ELIASSEN.—They always have been, yes.

(Thereupon, counsel for the plaintiffs inquired whether the telegram sent by Mr. Lieurance or Mr. Eliassen to Mr. Moore, after the last allowance was procured in Portland had been put into the record.

(Testimony of Edward R. Eliassen.)

Upon being assured by counsel for the objecting creditors and also by the Master that the telegram had been put into the record, Mr. Lieurance, witness for the plaintiffs, made a statement, which should be treated as testimony, and which is as follows:) [380]

The reason I mentioned it was that the reason for that telegram had its inception in this meeting that has been referred to, when we agreed that as soon as the aggregate of the allowance was known we would notify Mr. Moore. Within an hour after the aggregate allowances were known in Portland that telegram was sent. It had to do with this meeting with Mr. Kirk and Mr. Moore on the 9th of December.

TESTIMONY OF A. F. LIEURANCE, FOR PLAINTIFFS (RECALLED—CROSS-EXAMINATION).

A. F. LIEURANCE, a witness for the plaintiffs, was recalled; and,—

Cross-examination by Mr. HENEY (Resumed).

Q. You do not mean to say that the word "aggregate" was used in that conference, the conference on December 9th?

A. No, I would not say that, Mr. Heney, but as soon as the amount of the allowances that the Courts would make was known—that was the sense of it, that was the understanding.

(Testimony of A. F. Lieurance.)

Referring to a carbon copy of a letter dated December 29, 1926, purporting to be from Roberts, Johnson and Rand, signed E. J. Hopkins, Credit Manager: I received the original of that letter in due course of mail.

(The original letter just mentioned was produced by the witness, and was introduced in evidence by counsel for the objecting creditors and was read into the record as follows:)

"ROBERTS, JOHNSON & RAND,
Branch of International Shoe Co.,
1505 Washington Ave.
St. Louis, Mo., December 29, 1926.

Mr. A. F. Lieurance,
1401 Central Bank Bldg.,
Oakland, Calif.

In re: R. A. Pilcher & Co.

Dear Sir:

When the writer was in New York the 17th of December, his attention was called to the exorbitant allowances to the Western Receivers and attorney in the above matter.

As you no doubt have been advised, the Eastern Receiver and attorney were asking what we felt were exorbitant fees and Judge [381] Hand looked at the matter in the same light. We finally got Judge Hand to allow the Eastern Receiver, Mr. Gotthold, $5000 and the Eastern attorney $7500.

I am writing this letter to you asking if you cannot do something to get the Western fees reduced.

(Testimony of A. F. Lieurance.)

According to Judge Hand and the Creditors' Committee that were in his court on the 17th of December, we felt that a total fee of $60,000 would be about right, $30,000 to go to the attorneys and $30,000 to go to the Receivers. Judge Hand felt that the Eastern Receivers should receive about $7,500 and the Western Receiver $22,500. This we feel, is very liberal and hope that you can use your influence to get the fees reduced to this amount.

Yours very truly,

ROBERTS, JOHNSON & RAND (Branch)

(Signed) E. J. HOPKINS,

EJH. Credit Manager."

I was not acquainted with Mr. Hopkins personally. I have not seen him. I know him from a business relationship, but I have never come in contact with him personally. I know who he is.

(Counsel for the plaintiffs announced that the witness was prepared to give the respective amounts of purchases made from certain stores, requested by counsel for the objecting creditors; thereupon, the witness testified upon the subject as follows:)

Mr. Hershey gave me these figures this morning, and in response to your request yesterday for the amount of merchandise purchased from Walton N. Moore and from A. V. Love, etc. The purchases from Walton N. Moore Dry Goods Company were $7,914.76, for three stores; average purchase per store $2,638.25. The purchases from the A. V.

Love Dry Goods Co. were $35,930.60, for thirteen stores, and the average per store was $2,764.43.

(At this point, counsel for the objecting creditors introduced in evidence two certain telegrams from William Fraser to Walton N. Moore; and which telegrams were read into the record as follows:)

The first one is dated at New York City December 27, 1926, and reads as follows:

"Walton N. Moore, care Walton N. Moore D. G. Co.
San Francisco, Calif.,

In New York Committees opinion allowances of receiver Lieurance and counsel grossly excessive and should be reduced.

WILLIAM FRASER." [382]

The second is dated New York City, January 27, 1927, and reads as follows:

"Walton N. Moore, San Francisco.

On your recommendation New York Committee agrees to proposition to pay fifteen thousand each to Receiver and Counsel although we feel that attorneys fee is excessive. This arrangement however is bound to reopen question of New York Counsel's fee.

WILLIAM FRASER."

(Thereupon, counsel for the respective parties agreed upon certain facts; and the remarks of the respective counsel upon the subject are as follows:)

Mr. CROSBY.—Mr. Heney, at this point, since those wires were sent, an additional $7,500 was allowed to counsel there: Is that not correct?

(Testimony of A. F. Lieurance.)

Mr. HENEY.—Yes. It did start things as they thought it would.

Mr. ELIASSEN.—They have received $15,000 to date on account, haven't they?

Mr. HENEY.—Who?

Mr. ELIASSEN.—McManus, Ernst & Ernst.

Mr. HENEY.—Yes, that is my understanding. A total of $7,500 to the Receiver; $5,000 first, and then $2,500.

Mr. CROSBY.—Yes, that is right.

Redirect Examination by Mr. CROSBY.

I replied to the letter dated December 29, 1926, from Roberts, Johnson and Rand, signed by Mr. Hopkins, the credit manager of that firm; I have a copy of my reply here; it is dated January 10, 1927.

(Thereupon, the reply by Mr. Lieurance just mentioned, was introduced in evidence and read into the record as follows:)

"Oakland, California, January 10, 1926.

Mr. E. J. Hopkins, Credit Mgr.,
Roberts, Johnson & Rand,
#1505 Washington Ave.,
St. Louis, Missouri.

In Re: R. A. Pilcher Co., Inc.

Dear Mr. Hopkins:

Replying to your letter of December 29th regarding the amounts of fees and compensation awarded

by the Ancillary Courts to attorneys and receivers in the R. A. Pilcher Company Matter. [383]

About December 1, 1926, the question of fees and compensation to attorneys and receivers was brought up by Messrs. McManus,, Ernst & Ernst, by telegram, and they requested to know the amount of fees and compensation Mr. Eliassen and I would ask for. We replied that we would ask for no specific amount but would leave the matter of the fixing of the fees entirely to the Court.

On or about December 9th, Mr. Eliassen and I went over to San Francisco to confer with Mr. Walton N. Moore, member of the Creditors Committee, and Mr. Joseph Kirk, attorney for the Board of Trade of San Francisco, regarding the obtaining of orders in the various Ancillary jurisdictions for the payment to creditors of a dividend of 40%, and to make application to the Courts for a payment on account to reecivers and attorneys. At this conference a telegram was read by Mr. Kirk, which stated that the Eastern attorneys and receivers were asking the New York Court for an allowance on account of $10,000. each and would ask for an additional similar amount to be paid to each of them at the close of the administration. Feeling that the amounts asked for, and to be asked for, by the attorneys and Receiver in New York were excessive, it was decided and agreed at this conference, as is clearly set forth in Mr. Moore's telegram to Mr. Fraser, copy of which is enclosed, that before an allowance

was made in New York, the allowances to be made in the ancillary jurisdictions were first to be ascertained in order that some definite idea as to the aggregate amount of the cost of the administration might be had. No amounts were discussed or fixed at this conference, however it was agreed with them, the same as with Mr. Love at Seattle, that the fixing of such amounts should be left entirely to the discretion of the Courts. Mr. Eliassen and I proceeded upon this basis, the results of which you already know, and which I phoned to Mr. Love from Portland and gave to Mr. Walton N. Moore by telegram as soon as such results were known.

Mr. Hopkins, I want you to know that no effort was made on our part to influence the Courts in any way. We made to the Courts true and accurate statements as to the amount of work done and amount of sales obtained in each jurisdiction and the general results obtained in all jurisdictions collectively, and when asked by the Courts the amount we were asking for, said to them frankly that any allowances which to them seemed fair and equitable based upon the services rendered would be satisfactory to us. When pressed for an answer as to the amount I would expect, I replied I know of no way to arrive at an amount except upon the basis of a percentage of the sales, and whatever was customary in this regard would be satisfactory to me. I know of no commissions on sales of merchandise, or even real estate, which is less than 5%, and Judge Bean in Portland set the Receivers compensation

at exactly 5% of the total sales in that jurisdiction. Judge Webster at Spokane set the Receivers' compensation at approximately the same figure and Judge Neterer in Seattle followed substantially the same course. Judge St. Sure in San Francisco, after hearing the testimony as to what had been done in the course of the Receivership, set both the attorneys and receivers' fees at $10,000 each. I, of course, informed the Courts that I had done all of the receivers' work in the jurisdictions where the stores were located and I felt that an equal division of the Receivers' fee would be inequitable. All of the Courts took the same view, hence the division of the fees between Mr. Gotthold and myself as made by the Courts. Compensation for Mr. Gotthold would not have been asked for in the Ancillary jurisdictions had I not received from him a telegram under date of December 15th, stating that he would expect to receive compensation in the Ancillary jurisdictions. Since then, I have received from Mr. Gotthold a communication stating that any compensation allowed [384] to him in the Ancillary jurisdictions would not be accepted. I have today written him to the effect that since he has changed his mind and now states he does not expect to receive compensation in the Ancillary jurisdictions, that the amounts awarded to him by the various Courts will be left in the General fund for distribution to the creditors. I understand that Mr. Gotthold has been awarded compensation to the amount of $5,000. in the District of New York, and that

no compensation was awarded to me there, which is entirely satisfactory to me. Since Mr. Gotthold will receive no compensation in the Ancillary jurisdictions, the total amount fixed by the Courts and awarded to me now amounts to $35,500., which as you will note is less than 5% of the amount of the sales.

For your further information, the volume of sales in the stores during the Receivership aggregated $500,000.00. The stores when sold brought an additional amount of $257,000.00, which makes total sales aggregating $757,000.00. Since the merchandise inventory, plus the purchases during the Receivership, aggregates slightly less than $700,000., it is apparent that the stores during the Receivership were handled in such a manner as to have shown a gross earning of upwards of $50,000. I feel that I can say, without a display of egotism, that it requires some knowledge of the chain store business, and at least some degree of merchandising skill, to bring about a result of this kind, especially when the morals of the organization was virtually destroyed and the assets were of a perishable nature and scattered from California to Western Washington. It is also apparent that approximately 80% of the total value of the property was saved out of the estate, after paying all operating expenses, except those expenses incurred in the administration, which are now thought by Mr. Moore, Mr. Kirk, and possibly other members of the Creditors Comimttee, to be exorbitant.

In the beginning of this Receivership, Mr. Moore and I could not agree upon the procedure to be followed. However, since that time Mr. Moore has spoken highly of the administration, and the results obtained, and was agreeable to leaving the matter of attorneys fees and compensation for receivers to the Courts. Now that the Courts have made their decisions, and everything has been handled in a fair and square manner, he is not satisfied with the awards, which have been made, and demands that Mr. Eliassen and myself consent to the setting aside of the Courts orders, that the creditors may be heard in this matter. We have carried out our part of the plan and agreement and we are opposed to the setting aside of the orders, which have been made by the Courts setting forth the allowances on account. However, we are not opposed to a review of this situation, and are ready and willing to go before all of the Judges in open Court, in the presence of any and all creditors, and have the matter re-viewed. If the Courts see fit to change their decisions, we shall abide by such decisions with grace, and if the Courts still feel that the compensation and fees allowed are fair and equitable, we shall be content to let them stand as they are. We have indicated this to both Mr. Moore and Mr. Kirk, and have expressed our willingness to have this matter re-viewed at any time, which suits their convenience or the convenience of other creditors.

Mr. Hopkins, there is no desire on the part of either myself or Mr. Eliassen to take advantage of

any one in this matter and since all creditors will be notified before the final hearing and will have an opportunity to be heard in Court, it seems to me that would be the proper time to take this matter up in the various jurisdictions and thresh it out on its merits. I asure you we have every desire to be fair in this matter and want only such compensation as we are entitled to and have earned. [385]

You state in your letter that the Creditors Committee and Judge Hand felt that a total fee of $60,000 would be about right; $30,000 to the attorneys and $30,000 to the receivers. Of course, I do not know upon what basis you arrived at this figure nor do I know just what position either Judge Hand or the members of the Creditors Committee are in to pass upon a situation of this kind without first having ascertained the amount of work done and the circumstances and conditions surrounding the administration. I cannot speak for the attorneys and Receiver in the East nor for Mr. Eliassen, however, I feel I can say for myself that I have given every minute of my time both night and day to this Receivership, neglecting my own business, to give to the creditors of the R. A. Pilcher Company an economical and efficient administration, and the results speak for themselves.

I have no desire to 'toot my own horn,' but I feel it is within the bounds of propriety to say, that it was not through the efforts of my co-receiver or the attorneys in this matter, that the results obtained were brought about, hence I am unable to

(Testimony of A. F. Lieurance.)

understand why the attorneys and receivers' fees and compensation should be divided equally as you propose. As I have stated above, Mr. Eliassen and I are opposed to the setting aside of the Court's orders fixing our allowances, however, we are ready and willing to have them re-viewed before the Courts at the final hearing, or at any previous date.

For you further edification, a dividend of 40% has been paid to all creditors whose claims have been adjusted and allowed. We have some five or six claims where the amounts involved have not as yet been reconciled. However, we have thus far been successful in adjusting these differences and we feel that the discrepancies in these claims will be adjusted very shortly and the dividends paid. In addition, we have about ten claims, which will have to be taken before a Master in Chancery. This will be done as quickly as possible, and it looks now like the administration can be brought to a close within the next four to six weeks.

Trusting this will make our position clear, and wishing you the compliments of the Season, and with kindest regards, I am,

Yours very sincerely,"

Redirect Examination of Witness Lieurance, by Mr. CROSBY (Resumed).

The foregoing letter was signed by myself.

Referring to the document which purports to be a copy of a general letter sent to the creditors of R. A. Pilcher Co., Inc., dated May 28, 1926, and

(Testimony of A. F. Lieurance.)

purporting to have been signed by various members of the Creditors Committee, including A. V. Love, Walton N. Moore, John Von Dohln, George G. Black, William Fraser, and Marvin W. Clark, Secretary: I never saw that document until it was handed to me by Mr. Heney yesterday here in Court; I never saw a copy of it.

Q. At the meeting on December 9th at the Board of Trade rooms, was [386] anything said by anyone about the preparation of a statement by you and Mr. Eliassen concerning your services or the amounts of allowances to be asked for by you and him in this matter, which statement was to be taken up with the members of the Board of Trade, or any of them, or with the members of the Creditors' Committee, or any of them, or with the creditors, or any of them, before you asked the Court for allowances?

A. No, sir, and I never heard of that until it was brought up here at this hearing.

I don't recall having met Mr. Moore at his office, about December 20, after we had returned from the north, and after having obtained these allowances; but I recall having interviewed him at Mr. Kirk's office in the Board of Trade. Mr. Moore, Mr. Kirk, Mr. Eliassen and myself were present at that interview.

At that meeting, there was something said about revision of fees; I will take that back; there was nothing said about revision of fees but there was something said about the excessiveness of the fees.

(Testimony of A. F. Lieurance.)

There was something said about seeking to set aside the orders. Mr. Kirk and Mr. Moore demanded that the allowances that had been made be set aside in their entirety. We told them that we felt they had been obtained fairly and squarely, according to our agreement and understanding, and that we had carried out our part of it faithfully, and that we did not feel that would be the proper thing to do. That was the substance of the conversation.

I could not state positively that there was nothing said about reduction of the fees. It was stated that we were willing to have the amounts reviewed before the Courts. That was stated there at that meeting.

On the 9th of December, when we had that meeting with Mr. Kirk and Mr. Moore, when that wire was made up and sent, Mr. Moore did not leave that office with Mr. Eliassen and myself. He did not remain there throughout our whole stay there. After he went away, [387] Mr. Eliassen, Mr. Kirk and myself remained there. It was after Mr. Moore had gone, that we had the conference with Mr. Kirk about going out to court the next day.

Recross-examination by Mr. HENEY.

My letter to Mr. Hopkins dated January 10, 1926, contains the statement that at the conference in Mr. Kirk's office on December 9, a telegram was read by Mr. Kirk which stated that the eastern attorneys and Receivers were asking the New York court for an allowance on account of $10,000, and

(Testimony of A. F. Lieurance.)

would ask for an additional similar amount to be paid to each of them at the close of the administration. That does not refresh my memory so as to enable me to say now that the telegram was read by Mr. Kirk. The matter was naturally fresher in my mind at the time that letter was written on January 10, than it is now; that was approximately a month afterwards. I think I testified that the substance of the telegram was known, if I am not mistaken.

Q. Yes, you did, and you also testified that the telegram as not read.

A. And I will testify to the same thing now. I don't know that I testified that it was not read; I might have. I don't recall its having been read.

Q. In the face of this letter would you now state that it was not read?

A. No, I would not, and I would not say that it was, either. The substance of it was known to me, at the time I wrote that letter.

Q. At the time that you were presenting the matter to the Court for the allowance of attorney's fees and Receiver's fees on account, and the first court in which you stated that you thought that five per cent commission would be right, did you explain to the Court that that amount on which you were asking it included the turn-over?

A. Included in the total gross sales.

Q. But did you explain to the Court that those total gross sales constituted a turn-over for several months' business? [388]

(Testimony of A. F. Lieurance.)

A. It was referred to as total gross sales.

Q. Was the other thing stated, at all?

A. I don't know that the matter of turn-over was mentioned.

No corporation that I have ever been connected with paid a commission to any one of its administrative officers. The Penney Company never did, except to the women employees.

However, the administrative officers were paid on the basis of the earnings. I don't know whether you would call it a commission, but it was a percentage.

For example: The president of the Penney Company, Mr. E. C. Sans, did not get any salary; but he got a compensation equal to 30% on the amount of stock that he held. That was not an earned dividend. It was compensation. I got the same thing. I got 30% of the earnings on the amount of stock I held in that particular part of the business.

The Penney Company is organized and exists under the laws of the State of Delaware; they have classified stock—or did have, they haven't any more; each store was given a number and a name that identified that particular classification of stock. When there was 600 stores there were 600 classifications of stock.

Stockholders in the Penney Company, all of whom worked for their interest, who produced the inside of the business—there as no stock ever sold on the outside, no man on the outside ever put a dollar into this business that was not earned within

(Testimony of A. F. Lieurance.)

the business; a stockholder might own a one-third interest in one store, he might own a one-sixth interest in another store, he might own a one-twenty-first interest in another store, etc. Each of those stores had from two to five, or six, or seven stockholders, all of whom were in this corporation; their particular part of the business was to contribute to the whole of this business, that is, I gave as much service to the stores that I had no interest in as to those that I did have an interest in. Instead of sharing in the interest of all of these. I [389] got mine from those in which I owned particular stock. So did everyone else.

In addition to the above, I got a salary of $10,000 a year.

Q. And what you got in the way of earnings, as you speak of it, was in effect your share of the profits of that particular store in which you owned this stock?

A. No. I got 30 per cent of what the stock earned as additional salary. However, it was not paid until the end of the year, when this was known.

I had an interest in sixteen or seventeen stores, out of six hundred stores at that time. My total compensation amounted to approximately $40,000 a year. I had no investment, except what I had worked for. I left two-thirds of it in the business, which I got in the form of a stock dividend. Originally, I made no investment at all, except labor; and I got stock for labor and services.

(Testimony of A. F. Lieurance.)

By the time that I was getting this $40,000 a year, when I was at the head of the advertising part of the business, there were 497 stores, if I remember right. The advertising for all of those stores was an important part of the business.

I got the $10,000 salary all of the time; and that was included in the $40,000. Sometimes it would be more than $40,000 and sometimes it would be a little less. It ranged from $35,000 to $50,000.

(The attention of the witness Lieurance was directed to the fact that the verification of the claim of Walton N. Moore Dry Goods Co., made by W. J. O'Connor, secretary and treasurer, recites the fact that said corporation had no security of any kind for the payment of said debt, but that it does hold two personal guarantees by J. C. Brownstone, of New York City, to pay not exceeding the sum of $10,000 and $20,000 respectively, copies of which guarantees were attached, marked Exhibits "B" and "C" and made a part of the claim; and the witness testified:) [390]

My recollection is that I saw some information of that kind on the claim that Mr. Moore filed. Moreover, Mr. Brownstone himself told me that he guaranteed them. I don't know whether it was prior to the receivership that he made the guaranty. I don't think there was anything said about the time. I think he simply stated that he had guaranteed the account.

DEPOSITION OF WALTER E. ERNST, FOR OBJECTING CREDITORS.

WALTER E. ERNST, called and sworn as a witness for the objecting creditors, testified, upon deposition, in substance, as follows:

Direct examination given in narrative form without interrogation: I am an attorney and counsellor at law admitted to practice in the State of New York and in the courts of the United States and have been such for approximately twenty years. I am a member of the firm of McManus, Ernst & Ernst, who are attorneys for the complainants, in the action brought by Sidney Gilson and others, trading as National Garment Co. against R. A. Pilcher Co., Inc., in the United States District Court in and for the Southern District of New York. The firm of McManus, Ernst & Ernst also were authorized by the Court to become attorneys for Arthur F. Gotthold and A. F. Lieurance, appointed Receivers in that action, and the said firm did become attorneys for the said Receivers.

In the latter part of June, 1926, I went to California to confer with Mr. Lieurance, Mr. Eliassen, Mr. Kirk and the large creditors in the west. That trip was made pursuant to resolution of the Committee of Creditors in New York. It had for its purpose in general conferring concerning the working out of the receivership, the management of the business incident thereto and the policy to be pursued by the

(Deposition of Walter E. Ernst.)

Receivers under the receivership. I conferred with Mr. Lieurance at great length, examined the accounts, in so far as they were then prepared and generally advised him as to desires [391] of the creditors in New York, who were represented by the so-called Eastern Creditors' Committee. I conferred at length with Mr. Kirk, with Mr. Walton Moore, member of the Committee of Creditors of the Pilcher Company and chairman of the Committee of Western Creditors. These interviews had for their purpose the adoption of a uniform plan to be approved by all parties in interest for the carrying on of the receivership and the continuance of the business pending the ultimate liquidation thereof. At that time it was believed that if some of the stores, which were unprofitable could be sold, the business might be saved for the corporation, providing some new capital was invested by one or two of the stockholders.

In the course of the conferences, at the office of Mr. Lieurance, which office was in the Central Bank Building, in Oakland, California, I ascertained from Mr. Lieurance the expenses of running the office, which he had opened and equipped and which was engaged, as I then understood and still understand, solely with the affairs of the receivership of the Pilcher Company, and for the purpose of giving me these expenses accurately, Mr. Lieurance called Mr. Hershey into the office. I tabulated the expenses which were given to me at that time by Mr. Lieurance and Mr. Kirk and they are as follows:

(Deposition of Walter E. Ernst.)

Rent monthly	$ 90.00
Help accountant monthly	300.00
Stenographer	125.00
Telephones and wires monthly approximately	30.00
Postage monthly approximately	10.00
Temporary help to complete inventory eight girls total cost approximately	300.00
Printing to date	155.00
Court costs in California	500.00
Court costs in Oregon about	500.00
Court costs in Washington about	500.00

In giving this testimony, I am reading from a memorandum, which I made on July 1st, 1926, at the time of that conference. Mr. Hershey is the accountant, referred to as the accountant, and at that time Mr. Lieurance told me that Mr. Hershey was receiving a salary of $300 per month. Later, Mr. Hershey told me that it was the first "job" that he had taken at a monthly basis and asked my [392] opinion as to how long it would last. He also asked me whether Mr. Leidesdorf, the accountant in New York was on a monthly basis, *per diem* basis or expected an allowance and I told him the custom was that the accountants asked for an allowance when their work was finished but that such allowance was usually based upon *per diem* services. At no time during our conversations, concerning the management of the office, or the conduct of the receivership, did Mr. Lieurance state to me that one of the expenses would be the fixation of

(Deposition of Walter E. Ernst.)

accountant's allowances or fees. Mr. Lieurance and I did talk about the Receivers' fees and the fees of counsel for the Receiver. Those were the only fees which were referred to as having to be fixed thereafter.

I have given the foregoing testimony because a commission has been issued to take my testimony and I have been requested to give the testimony.

In connection with the present controversy, concerning the fixation of fees for Mr. Lieurance and Mr. Eliassen, his attorney, I wish to state that I appreciate that Mr. Lieurance has given practically all, if not all, of his time for at least the months of June to September, 1926, in the furtherance of the affairs of the receivership. I know that the result of the receivership has been that many of the stores have been sold for a very satisfactory figure—I mean figures which should be satisfactory to and please the creditors. I believe, however, that much of the added work and effort of Mr. Lieurance was caused by controversial letter writing between the east and west, as to matters which were legal in their aspect and could have been, and I believe should have been, readily decided by either his attorney in the west, or Messrs. McManus, Ernst & Ernst in the east, who were attorneys for both Receivers.

I attended a meeting of the Committee of Creditors of R. A. Pilcher Co., Inc., which committee was duly elected in the latter part of May, 1926. All of the members of the committee were present, [393]

(Deposition of Walter E. Ernst.)

except Mr. Love and Mr. Moore. At the said meeting, which was held in the month of March, 1927, it was unanimously resolved by those present that opposition should be made to the payment of any further fees or allowances to either Mr. Lieurance or Mr. Eliassen.

Cross-examination by Mr. ELIASSEN.

The members of the eastern Creditors' Committee, who were present at the meeting in March, 1927, of which I have just testified, were Mr. Fraser, Mr. Wittenberg, Mr. Lebowitz and Mr. Schmidt. Mr. Brownstone was present, although I do not think he is a member of the Committee. My recollection is that there were two other members of the Committee present whose names I can't recall now. I said before that all of the members were present, except Mr. Love and Mr. Moore, because of the statement made to me that there was a full meeting, except for the two westerners.

WITNESS.—(Continuing.) I wish to add, if it may aid anyone in comparison of fees, that my office gave its attention to this matter daily from the day we were retained late in May until the end of 1926. That during that time, I took the trip to the west, to which I have heretofore referred, occupying, as I recall it, a little less than three weeks. That there were many appearances in court. That in the year 1927 I appeared before Mr. Cardozo the Special Master on at least twenty occasions for the purpose of taking testimony in the contested claims.

(Deposition of Walter E. Ernst.)

That exclusive of court work, there were almost daily conferences with the Receiver in New York. There was correspondence by mail and telegram, with Mr. Lieurance and with Mr. Eliassen. That there was correspondence to the extent of an average of no less than three letters a day with various creditors. That during the month of August of 1926, there were frequent conferences with persons who it was thought could be induced to invest sufficient money to rehabilitate the business. That my office endeavored for about a month in the latter part of the summer of 1926 to induce purchasers [394] to take over the business. That as a result thereof, at the hearing before Judge Hand, for the purpose of disposing of the assets of the corporation, there were approximately ten bidders present, all of whom were responsible and were ready to bid, except for the restrictions that were necessarily placed upon the sale by reason of the notice that was sent from Oakland. That all steps as to policies taken by my firm were taken only after conferences with and meeting of the Creditors' Committee.

Cross-examination by Mr. ELIASSEN.

(The witness was asked to give the names of the ten bidders above mentioned, and the witness testified:)

I haven't any papers with me. I can only give them by recollection. I know that Mr. Haibloom was present representing a bidder. I know that Mr. Nathan Steinfeld was present, Mr. Calder was present, Mr. Shaap was present, Mr. Alexander was

(Deposition of Walter E. Ernst.)

present and Mr. Karp was present. I recall the above-named gentlemen because I have had numerous conferences with them and I know that they are in the business of buying bankrupt stock. Those are the ones I recall.

This Mr. Haibloom is the same man who offered $325,000 for all of the assets, including the cash on hand, at a meeting held on September 8, 1926; but at that time he made an offer for somebody then interested in the business. He appeared in court as a representative of a man named Frankel.

Some of these men indicated how much they were willing to pay for the stores but I haven't the figures. Some of these men offered bids in writing, at my office, or to the court. Some of these bids were accompanied by a deposit. I do not recall all bids which I received in writing and with a deposit but I do recall that a deposit of 10% was made in three instances. I do not recall at this time the amount of any bid received.

These men (the bidders above mentioned) are men who are in the business of dealing in bankrupt stocks. They are not in the chain store business themselves. One of them is in the ladies' chain [395] store business.

Q. Which one is that Mr. Ernst?

A. Mr. Frankel and one of the bidders, who acquired through a representative, or in conjunction with an associate, four or five of the stores by bidding therefor in the west.

(Deposition of Walter E. Ernst.)

I do not recall what stores were acquired as just stated, or the name of the person who acquired them. I only know about the stores because Mr. Shaap told me about them. He didn't say what stores they were, or, if he did, I don't recall them.

These three bids that were received must have been reported to the Court, because I think one bid was the basis upon which we got the order. Those bids, however, were not as good or as high as the bids which you (Mr. Eliassen) received in the west at that time.

Q. That, as a matter of fact, was the real reason why the bids were not submitted.

A. The real reason is that we were to have what is termed an auction sale or what is really bidding and when the proceedings were had that morning there were so many limitations placed upon the bidding that the prospective bidders refused to make any bids in open court. In short, these men who I know to be in that business and who I knew had come there for the purpose of bidding said that, in view of the restrictions, and, in view of the manner in which the bids had to be made, that is subject to bidding in the west, they wouldn't bid in the east and would rather take their chances in the west, so as not to bid against themselves. They said they might just as well offer no bid here and have their emissaries or representatives in the west make the bids for them. They didn't refrain from any bidding because of any tactics on the part of

(Deposition of Walter E. Ernst.)

Mr. Lieurance but merely because they didn't want to bid against themselves.

Q. What was done with these bids that were received by you, the three initial bids you spoke of?

A. They were just left go. [396]

DEPOSITION OF ARTHUR F. GOTTHOLD, FOR OBJECTING CREDITORS.

ARTHUR F. GOTTHOLD, called and sworn as a witness for the objecting creditors, testified, upon deposition, in substance, as follows:

Direct Examination by Mr. WALTER E. ERNST.

I am an attorney and counsellor at law, admitted to practice in New York State and in the United States Courts. My office is at 27 Williams St., New York City. I have been practicing 25 years.

I am one of the Receivers in a case entitled in the United States District Court for the Southern District of New York, Sidney Gilson and others against R. A. Pilcher Co., Inc. I was appointed temporary Receiver and qualified as such; afterwards I was appointed permanent Receiver and qualified as such. Since that time I have been one of the Receivers of the R. A. Pilcher Co., Inc. My accounts have not been settled except that I have made partial and somewhat informal reports to the Court of the conditions.

I know that Mr. A. F. Lieurance was appointed Receiver in ancillary proceedings brought in California, Washington and Oregon; and I was also

(Deposition of Arthur F. Gotthold.)

appointed Co-receiver in these ancillary proceedings.

I know that in the month of December, 1926, Mr. Lieurance, as one of the Receivers in these ancillary proceedings applied for an allowance for himself as ancillary Receiver, and for an allowance for his attorney; and he also applied for an allowance for me as Co-receiver.

I did not sign any application or petition for allowance in any of these ancillary proceedings.

I did not authorize Mr. Lieurance to petition the courts in California, Oregon or Washington for an allowance to me, as one of the Receivers in the ancillary proceedings pending in those courts.

I did not join with Mr. Lieurance in any application or petition for an allowance.

I did not receive any part of the allowances which were granted by the courts of Washington, California and Oregon, during [397] the month of December, 1926.

I understand that the net amount which Mr. Lieurance has received to date, for his services as Co-receiver in the ancillary jurisdiction is the sum of $15,000. He previously received more than that but, I am informed, he returned a portion of that allowance to the Receivers' estate.

I understand that the net amount which Mr. Eliassen has received from the courts of Washington, Oregon and California, as attorney for Mr. Lieurance in the ancillary proceedings pending in

(Deposition of Arthur F. Gotthold.)

those courts is the sum of $15,000; he having also received allowances in excess of that sum, but having returned a portion to the receivership estate.

I have a general knowledge of the services which were rendered by Mr. Lieurance in connection with his duties as Co-receiver in these proceedings.

I have heretofore been appointed Receiver by the federal courts in this jurisdiction. It would be difficult to say in how many instances I have been so appointed, but it is more than ten times.

I have a general knowledge of the fees and allowances which are given Receivers for services rendered in equity proceedings where they have been appointed Receivers in federal courts.

I have formed an opinion, sufficient to enable me to express a belief, as to the compensation to which Mr. Lieurance is entitled as Co-receiver. I think $20,000 would be a fair compensation; that is, $5,000 in addition to what he has already received.

That expression of opinion is based on my experience here in New York, and on my examination of documents and correspondence, which have been submitted to me, showing the work that has been done in this particular case.

As a Co-receiver I would be satisfied that he be awarded that sum by the court in California without making any claim to any part of it. [398]

I really have not formed any opinion as to the amount to which Mr. Eliassen would be entitled,

(Deposition of Arthur F. Gotthold.)

as attorney for Mr. Lieurance as Receiver, because I have not sufficient knowledge as to what services Mr. Eliassen has performed.

I did not at any time consent to the payment to Mr. Phillip Hershey of the sum of $5,900 on or about December 31st, 1926. I knew that Mr. Hershey was employed, as an accountant, by Mr. Lieurance and myself, as Receivers; and I was informed by you (Mr. Ernst) that he was employed at a specified salary. I was informed by you (Mr. Ernst) about that specified salary at the time of your return from California. You gave me that specified salary at the time that you gave me the list of employees of the Receivers, and their salaries, and the expense of conducting the office.

Cross-examination by Mr. ELIASSEN.

I had considerable correspondence with my Co-receiver, Mr. Lieurance, during this administration, both by telegram and by letter.

I am quite sure that I sent to Mr. Lieurance the telegram dated December 8, 1926, reading as follows: "I shall be glad to know your views as to allowances to receivers and counsel as soon as possible." My recollection is that this telegram was sent for me by Mr. Ernst but was sent with my knowledge and approval.

The telegram from myself to Mr. Lieurance dated December 9, 1926, a copy of which is now

(Deposition of Arthur F. Gotthold.)

shown to me, was either sent by me, or by Mr. Ernst for me, and with my consent and approval, after having read it to me over the telephone. The telegram I refer to reads as follows:

"Suggested interim allowances in New York are Ten Thousand Dollars to receivers to be divided equally ten thousand to New York counsel stop New York counsel to make no application in ancillary jurisdictions over figures indicated satisfactory to court and generally to creditors but before payment is made we hoped to get some estimate of allowance so that figure might be cut down to reasonable amount.

(Signed) ARTHUR F. GOTTHOLD."

As to the telegram dated December 15, 1926, from myself to [399] Mr. Lieurance, at Oakland, California, I make the same answer; it was either sent by me, or sent by Mr. Ernst with my consent and approval.

(Thereupon, the telegram was read into the record, as follows:)

"Regret we have had no further word in answer our telegram and Fraser letter Stop Further answering your telegram December tenth it has not been suggested here that I receive allowance in New York only Stop I am informed you and Mr. Walter Ernst agreed both of us to apply for allowances in New York and also in each of ancillary jurisdictions in event that separate applica-

(Deposition of Arthur F. Gotthold.)

tions should be made Stop We are asking Judge Hand for a hearing on Friday reference interim allowance Stop Shall be glad to know your views before that time.

(Signed) ARTHUR F. GOTTHOLD."

(After Mr. Eliassen read the telegram as above, the witness Gotthold made the following statement:)

I think that is not correct. My recollection is that it read "it has now been suggested here." But I sent a telegram similar to that. I have not at the present time recollection of the exact language. I have, however, a carbon copy of the telegram, as it was sent. I shall be glad to furnish it for comparison.

Q. Now, was it your understanding, Mr. Gotthold, that Mr. Lieurance was to apply for allowances on account of both of you in the ancillary jurisdictions?

A. I never had any clear understanding as to what he was to do. I wrote him repeatedly and telegraphed him and discussed it also with my counsel and I understand that they wrote to try to get from him some definite statement as to the plan that was to be adopted and when Mr. Hershey was here in about November, 1926, I discussed the matter with him several times and requested him to get for me from Mr. Lieurance a definite outline of the plan to be adopted. I was confused up to the very time that applications were actually made.

(Deposition of Arthur F. Gotthold.)

Q. As a Co-receiver in the ancillary jurisdictions, you expected compensation, *do* you not?

A. I expected for my services as Receiver adequate compensation but [400] I did not necessarily expect that it would be paid in the ancillary jurisdictions. One of the plans that was discussed and which was finally adopted was that I should receive an allowance or allowances from the federal court in this jurisdiction and waive any claim to compensation in the other jurisdictions.

Q. That was after December, 1926, was it not?

A. It was discussed back and forth before that time but that was the time when it was adopted.

Q. Did you at any time subsequent to the making of the applications, protest to Mr. Lieurance that it was not your desire to apply for compensation in those jurisdictions of the west?

A. I don't know that I protested but I stated it was not my intention and I either wrote or telegraphed to that effect, I think both, to Mr. Lieurance that if any payments had been made to me for allowance in the western jurisdictions, I would immediately redeposit the amount of the check so drawn in the receivership estate.

Q. That was done, was it not, after you and he had agreed that you were to accept the allowances made here in New York in full for your compensation and Mr. Lieurance to accept the allowances made to the Receivers in the western jurisdictions for his compensation?

(Deposition of Arthur F. Gotthold.)

A. I don't know that we made any definite agreement but after that procedure was adopted. I don't recall having made any definite agreement with Mr. Lieurance on that subject.

Q. You did send a wire to him to that effect, did you not?

A. At least one and I think several.

I received a telegram from Mr. Lieurance, on or about the 15th of December of last year. (Mr. Eliassen then read the telegram into the record as follows:)

"Reply your wire December Fifteenth I have received no letter from Mr. Fraser neither did I write to him Stop No agreement was made between Walter Ernst and myself regard receivers compensation Stop As wired you December Tenth a suggestion was made that you take all of the allowance made in New York and I take allowance to be made here in west Stop This is I believe fair and equitable does this plan meet with your approval.

(Signed) A. F. LIEURANCE." [401]

WITNESS.—(Continuing.) I do not recall the exact wording of the telegram, but I think that the above is substantially correct.

It is true that under date of December 16, 1926, I sent a telegram to Mr. Lieurance in reply to the telegram just read into the record, and the copy now shown to me is substantially correct. (Mr. Eliassen then read the telegram into the record, as follows:)

(Deposition of Arthur F. Gotthold.)

"Replying your wire December Fifteenth Fraser letter should have reached you Stop My opinion regarding allowances come from Mr. Walter Ernst I regret misunderstanding Stop Your suggestion as to allowances is acceptable to me but I hope that aggregate of allowances will be kept to reasonable figure Stop Hearing before Judge Hand set for afternoon of December Seventeenth will submit matter to him then.

(Signed) ARTHUR F. GOTTHOLD."

WITNESS.—(Continuing.) I made an application here in New York, in the month of December, 1926, for allowances to myself as Receiver. I don't recall whether that application was made on behalf of both myself and Mr. Lieurance.

Q. In the matter of that application, did you consult with Mr. Lieurance, do you recall?

A. One of the telegrams you have just shown me shows that I telegraphed him the suggested allowances. My recollection is that there were other telegrams or letters passing between us on the same subject.

Q. I show you, Mr. Gotthold, what purports to be a certified copy of the Third Report of Receivers, dated December 6th, 1926, and Petition, the original of which was apparently filed in the United States Court here in New York, and ask you whether or not the original was signed by you, on behalf of both Receivers?

A. The original of this was signed as follows:

(Deposition of Arthur F. Gotthold.)

"Receivers in Equity of R. A. Pilcher Co. Inc. by Arthur F. Gotthold, verified by me on December 6th, 1926.

I don't recall whether that petition was filed in the proceeding here in New York, on or about December 6, 1926. I assume it was filed. I did not file it. I remember that there was a hearing [402] on the matter. The papers that you now show me show that an order was signed on December 7th, 1926, which recites the Third Report and the Petition of the Receivers, so I assume that the paper entitled Third Report of the Receivers is the one that was filed, although it was not certified and I do not recall the exact wording at the present time. I will ask Mr. Ernst to ascertain the facts and state them on the record.

This petition, a copy of which has just been shown to me, prays for "*ad interim* allowances for themselves and their counsel."

Q. And the report all the way through has not been the report of one receiver but the report of both yourself and Mr. Lieurance, as Receivers in this jurisdiction? A. That is correct.

Q. Now, did you show this report to Mr. Lieurance before it was filed?

A. I don't know whether or not it was submitted to him by my counsel.

Q. No authority was given by him to file such a report?

A. Oh yes, up to that time it had been understood, as indicated in the letters and telegrams

(Deposition of Arthur F. Gotthold.)

passing between us, that application was to be made in the court here and I was trying to get Mr. Lieurance to indicate what he considered proper compensation by way of allowances. Being unable to arrive at that result, that plan was abandoned and on December 7th, 1926, when this report was apparently filed, that plan was abandoned and a further hearing was directed by the Court and on that further hearing application was made for allowances to me and to New York counsel and I notified Mr. Lieurance that I did not wish to apply to the western jurisdictions and would not take compensation even if it were awarded. I think that covers it.

Q. As a matter of fact, you had an arrangement with him, did you not, as evidenced by correspondence, both letter and telegraphic, that you were to sign checks here on behalf of Receivers, make necessary reports and accounts here and that he on the other hand was to do likewise in the west? [403]

A. So far as signing checks is concerned, that is correct. On the question of making reports, I don't recall that there was any definite arrangement made.

I made other reports on behalf of the Receivers, in the United States District Court here, in addition to the one that has just been called to my attention. My recollection is that they were made on behalf of both Receivers.

Q. About how many reports have been filed here on behalf of both Receivers?

A. The paper which you showed me indicates

(Deposition of Arthur F. Gotthold.)

that there were two before the third report and my recollection is that a subsequent report had been filed, although it may be entitled a petition.

Q. And those documents or instruments were filed on behalf of both receivers?

A. The first, second and third were. My recollection is that the fourth was not. The fourth was my own petition for a subsequent allowance.

Q. Did you send to Mr. Lieurance, before the filing of any of these three reports that you have just mentioned, drafts of the same, asking for any comments or approval?

A. The first report was filed on July 6th, 1926. Mr. Walter Ernst was then in California. He sent us several long telegrams and spoke to Mr. Irving Ernst over the telephone. Mr. Irving Ernst and I completed that report on July 5th, 1926, which was a holiday and the general purport of that report was sent to Mr. Walter Ernst who in turn, I am informed, took it up with Mr. Lieurance. I can't tell you whether the telegram came in just before or just after it was filed. The hearing was on the morning of July 6th. That was a report which indicated the general situation and asked for the views of the Court and creditors as to whether or not the Receivers should be permanent. My recollection is that the order entered on that report was telegraphed verbatim to Mr. Lieurance as soon as it was entered.

I don't recall the second report; and I don't recall whether [404] I submitted it to Mr. Lieu-

(Deposition of Arthur F. Gotthold.)

rance first. I do recall the third; most of the matters contained in that report were the subject of correspondence and telegrams passing between me and Mr. Lieurance in advance of the preparation of the report.

Q. Do you recall whether or not you told Mr. Lieurance that you were preparing a report and would file it? A. Oh, yes.

Q. In advance of this particular report?

A. Yes.

I have that correspondence. Mr. Ernst has copies of all the correspondence passing between Mr. Lieurance and myself. It is available for your inspection.

Q. Are you making any objection, Mr. Gotthold, because of any neglect on the part of Mr. Lieurance to first submit to you before filing any reports that were filed in the western jurisdiction?

A. I am not making any objection to anything. I am testifying as a witness. I am not a party to this proceeding.

Q. Have you ever made any objection on that account in the premises?

A. I requested Mr. Lieurance to indicate the sums that he was going to ask for. To this request I never got any answer. I felt at the time and still feel that it would have been much better if Mr. Lieurance and you had indicated your views in advance to the applications to the Court and had obtained the views of the creditors before making

(Deposition of Arthur F. Gotthold.)

such application. My feelings are not hurt on that account.

I have not at any time questioned the authority of Mr. Lieurance to file any reports on behalf of the Receivers; but I several times requested Mr. Lieurance to let me see what he was going to file before he filed it. My recollection is that I made several of those requests by letter or telegram. One request I made over long distance telephone, at a conversation that I had with Mr. Lieurance last winter some time and several I made of Mr. Hershey, upon his assurance that he would take the matter up with Mr. Lieurance but whether or not he did so I cannot say.

I think I sent a letter or telegram directly to Mr. Lieurance [405] concerning that. I am not positive. I will try to find it. I will state I have no present recollection of any letter to that effect but I have a very distinct recollection of several definite conversation with Mr. Hershey on the subject and my telephone talk with Mr. Lieurance. My telephone talk with Mr. Lieurance impresses itself on my memory because it was the only time I ever spoke to him on the telephone.

(Asked if he recalled "when that was," the witness answered:)

If you have the complete correspondence file here, you will find a telegram from me that I would call him up at his office on a given date. I should say that it was early in January of this year, but I may be wrong about that. I know

(Deposition of Arthur F. Gotthold.)

that I had telephoned him on the date that I said I would. I don't recall it but the date can be fixed by my office records and your telegram. If you find that telegram, you may put on the record that the conversation was on the date stated in the telegram.

Q. Now, as to the account, Mr. Gotthold, have you any objection, other than to that item of $5,900, which was spoken about?

A. I filed no objections, Mr. Eliassen. I have felt and still feel that the amount paid to Mr. Hershey was excessive and I have so stated.

Q. Did you concur with those objections that have been filed by certain objectors in the west, particularly in regard to that item of $5,900?

A. I don't know what you mean by "concur."

Q. These people say that you did concur with them?

A. I don't know just what you mean by "concur." I have stated repeatedly to you, Mr. Lieurance, to the Creditors' Committee and to Judge A. N. Hand that in my opinion the amounts asked by way of allowances in the western jurisdictions were excessive and that the amounts paid to Mr. Hershey, as accountant, was excessive. Those were merely statements of my personal opinion, based on my knowledge of this particular case, and, of course, based to some extent on my experience. [406]

I have seen a copy of the account as filed. I have gone over it.

(Deposition of Arthur F. Gotthold.)

Q. Did you find any other item of the account, other than the $5,900, that didn't seem proper?

A. I think there was another payment to Mr. Hershey, in addition to that $5,900 item but my recollection may be wrong about that. I have not looked at the account in sometime. At the time that I examined the account, I wrote Mr. Ernst, or his firm, my views about it and I have no objection to that letter being produced.

Q. You don't know whether or not that communication was forwarded to me or Mr. Lieurance, do you?

A. I don't recall. I know that at the same time I communicated with you or Mr. Lieurance, or both of you, but whether I sent you a copy of that particular letter, I don't recall.

Q. You don't want the courts out west to get the idea, do you, Mr. Gotthold, that the account is not the account of the Receivers and only the account of Mr. Lieurance?

A. No, I take it that the account is the account of both Receivers of transactions conducted by Mr. Lieurance on behalf of the Receivers and, so far as I know, no one has falsified the account in any particular.

Q. The only objection then, I take it, that you have to the account, or report, or petition is first the objection to that one item of money paid by Mr. Lieurance to the accountant, Mr. Phillip Hershey, and then to the payment of any further allowance to Mr. Lieurance or myself?

(Deposition of Arthur F. Gotthold.)

A. I wish you wouldn't use the word "objection." I have tried to make my position clear. I did not feel and do not feel that the payment or payments to Mr. Hershey were justified, to the extent that they have been made and I do not feel that further allowances should be made to Mr. Lieurance or to you of the sums which you have requested. I have not stated that in my opinion no further allowances should be made. [407]

Q. Isn't it a fact, Mr. Gotthold, that the only knowledge you have of the amount of work done and time spent by Mr. Lieurance, in the administration of this estate in the western jurisdictions, is that you have learned from the correspondence and the reports?

A. No, that is not correct, if by the reports you mean the formal reports filed in court. I state that, in addition to those, I, or the accountants employed by me, received weekly reports and in some cases daily reports of the work done in the different jurisdictions, supplemented by monthly reports prepared by the accountants, supplemented by oral reports made to me by Mr. Walter Ernst, after his return from California, and further reports made to me by or through the Creditors' Committee, some members of which were in the west, and also supplemented by several long conferences with Mr. Hershey and many conferences with the accountants employed by me, who at my direction obtained various bits of information.

Q. From whom did they obtain this information?

(Deposition of Arthur F. Gotthold.)

A. From Mr. Lieurance, from the store managers, from banks in the west, from Mr. Hershey, from creditors and from various other sources. [408]

The MASTER.—The practice in the Master's office is prescribed by Rule 114, I think it is, whereby it is contemplated and states it, as I recall, by using the word "shall." "The Master shall announce his report in the form of a draft, and give the parties an opportunity to file objections." Then it goes on to say that he considers the objections, and rules on them, and files his report, either modified or unmodified, with the Clerk, and then the procedure is, as you know, to file exceptions with the Court. That is rather a cumbersome procedure. It seems to me that in a matter of this sort there is no need of filing exceptions with me. I am going to state what fees I think are proper, and if either party thinks they are too much or too little, that is about all that can be said. Do you want to file objections with me in this matter?

Mr. HENEY.—No, I do not think so.

Mr. CROSBY.—There is no use making the procedure any more cumbersome than is necessary.

The MASTER.—It takes time. Then I suggest that the parties stipulate that the procedure as laid down by the rule of this Court, to the effect that the Master first announce his report in draft form be waived, and that the Master shall file his report when it is ready in the Clerk's office, and give the parties notice by mail in the usual way.

Mr. HENEY.—It is so stipulated.

Mr. CROSBY.—We will so stipulate.

The MASTER.—Then the matter will be submitted on briefs as agreed. [409]

EXHIBITS INTRODUCED IN EVIDENCE.

RECEIVER'S EXHIBIT No. 1.

Consists of a letter dated May 11, 1927, McManus, Ernst & Ernst to A. F. Lieurance; also a letter dated May 27, 1927, Arthur F. Gotthold to A. F. Lieurance; together with a copy of the Order of Court signed by August N. Hand, United States District Judge, attached to such letters; and which documents are as follows: [410]

(Letter-head of Gotthold, Pitkin, Rosensohn & Travieso.)

May 11, 1927.

AFG/HAP

Re R. A. Pilcher Co.

Dear Mr. Lieurance:

Judge Hand yesterday directed the payment of a second dividend of 10% and also directed the following payments to be made:

McManus, Ernst & Ernst, Ad interim allowance, $7,500, disbursements $295.25	$7,795.25
S. D. Liedesdorf & Co., services to Receivers	5,000.00
Horwitz, Rosston & Hort, allowance for services as attorneys for defendant	1,250.00

William Fraser, as Chairman of Creditors' Committee, for payment to Francis J. Heney for services rendered	1,500.00
Arthur F. Gotthold, Ad interim allowance	2,500.00

I trust that the dividend can be paid promptly. Please let me hear from you as to when the checks will go out.

Very truly yours,
(Signed) ARTHUR F. GOTTHOLD.

A. F. LIEURANCE, Esq.,
1401 Central Bank Building,
Oakland, Calif. [411]

(Letter-head of McManus, Ernst & Ernst.)
May 11, 1927.

A. F. Lieurance, Esq.,
Central Bank Bldg.,
Oakland, California.
Re R. A. Pilcher Co., Inc.

Dear Sir:

Herewith you will find certified copy of the order directing the declaration of an additional dividend.

Very truly yours,
(Signed) McMANUS, ERNST & ERNST.
WEE/EWD [412]

United States District Court,
Southern District of New York.

In Equity—No. 37/146.

SIDNEY GILSON, HERMAN AVRUTINE and SAMUEL AVRUTINE, Co-partners Engaged in Business as National Garment Co.,
Complainants,

against

R. A. PILCHER CO, INC.,
Defendant.

ORDER.

This cause having come on to be heard this 4th day of May, 1927, on the Fourth Report and Petition of the Receivers herein, and after hearing Irving L. Ernst, Esq., of counsel for the Receivers, and after reading the petitions of the S. D. Liedesdorf & Co., Horwitz, Rosston & Hort and A. F. Gotthold,

Now, on motion of McManus, Ernst & Ernst, attorneys for the Receivers, it is hereby

ORDERED AND DECREED: That a second dividend of ten (10%) per cent be declared and paid to all creditors whose claims have been filed and allowed by the Receivers herein; and it is further

ORDERED AND DECREED: That a second interim allowance of $2500, be, and the same hereby is allowed to Arthur F. Gotthold, on account of his services as Receiver herein, and that a second

interim allowance of $7500, together with disbursements of $295.25, be, and the same hereby is allowed to McManus, Ernst & Ernst, on account of services rendered as attorneys for the Complainants and Receivers herein; and it is further

ORDERED AND DECREED, that the sum of $5000, be, and the same hereby is allowed to S. D. Leidesdorf & Co. for services rendered to the Receivers and to the Estate of the Defendant as Accountants; and it is further [413]

ORDERED AND DECREED, that the sum of $1250., be and the same hereby is awarded to Horwitz, Rosston & Hort as attorneys for the Defendant herein; and it is further

ORDERED AND DECREED, that the sum of Fifteen Hundred Dollars ($1500.) be, and the same hereby is allowed to Creditors' Committee for payments to Francis J. Heney, for special services as counsel rendered herein, and the Receivers are hereby directed to pay out of the funds in their possession the allowances hereby granted.

AUGUSTUS N. HAND,
U. S. D. J.

O.K.—EE.
A true copy.
[Seal] ALEX GILCHRIST, Jr.,
Clerk. [414]

RECEIVER'S EXHIBIT No. 2.

Consists of the statement prepared and submitted by Edward R. Eliassen concerning the services rendered by him as attorney for the Receivers; and which document is as follows:

(Titles of the four cases in the four western jurisdictions, respectively, mentioned in the evidence.) [415]

I was retained by Mr. A. F. Lieurance on June 3, 1926, when I received Notice of his appointment as one of the Receivers of the R. A. Pilcher Co. Inc. in a proceeding commenced in the United States District Court in and for the Southern Division of New York, and I have acted for the Receivers, A. F. Lieurance and Arthur F. Gotthold, ever since that time as their attorney in the four ancillary jurisdictions and in the proceedings thereafter instituted by me in the United States District Court in and for the Northern District of California, Proceeding No. E 1707; in the United States District Court in and for the District of Oregon, Proceeding No. E 8846; in the United States District Court in and for the Western District of Washington, Proceeding No. E 540; and in the United States District Court in and for the Eastern District of Washington, Proceeding No. E 4293.

These proceedings were instituted at the request of the New York Creditors' Committee and its attorneys, McManus, Ernst & Ernst, Esqs., and at their suggestions I obtained in these four Western jurisdictions the appointment of the same Receivers as were appointed in New York. The proceedings in California were instituted at San Francisco by me on June 9, 1926, and an Order of appointment was obtained on the same day.

On June 14, 1926, the proceeding was instituted at Portland, Oregon, and I obtained Order of Appointment on the same day.

On June 15, 1926, an Order of Appointment was made after proceedings duly taken at Seattle, Washington; and on the [416] 16th of June, 1926, an Order of Appointment was granted at Spokane, Washington.

The defendant Company had a chain of sixteen (16) stores in California, Oregon and Washington, and was engaged in the business of selling merchandise. These stores were located as follows:

Stockton, California;
Turlock, California;
Oroville, California;
Klamath Falls, Oregon;
Albany, Oregon;
Pendleton, Oregon;
Portland, Oregon;
Roseburg, Oregon;
Eugene, Oregon;
Tacoma, Washington;
Monroe, Washington;
Yakima, Washington;
Aberdeen, Washington;
Everett, Washington;
Wenatchee, Washington;
Bremerton, Washington.

Immediately after his appointment as Receiver, Mr. Lieurance took all of these stores into his possession and continued to operate them until they

were sold, between October 25, 1926, and November 3, 1926, a period of about five (5) months; sales of merchandise over the counter were made aggregating $499,263.28—approximately one-half of a million dollars.

Previously, Mr. Lieurance caused an inventory to be taken as of date June 21, 1926, showing merchandise on hand amounting to $599,717.72, as follows: [417]

Stockton, California	$ 43,676.48
Turlock, California	35,111.87
Oroville, California	21,529.93
Klamath Falls, Oregon	49,714.29
Albany, Oregon	24,383.81
Pendleton, Oregon	35,227.30
Portland, Oregon	45,275.38
Roseburg, Oregon	18,646.93
Eugene, Oregon	52,269.38
Tacoma, Washington	57,525.74
Monroe, Washington	28,672.26
Yakima, Washington	45,169.16
Aberdeen, Washington	35,071.24
Everett, Washington	31,800.35
Wenatchee, Washington	33,579.70
Bremerton, Washington	42,063.90
TOTAL	$599,717.72

Because of the high fixed charges connected with the stores, it was decided that it would not be profitable to continue operations, and after consulting with some of the principal creditors, it was decided

to sell all of the stores. Steps were then taken to dispose of them. After proceedings duly had and taken, the sales were made and confirmed by the four ancillary Courts as follows, to-wit:

California	$ 41,000.
Oregon	97,600.
Western Washington	90,000.
Eastern Washington	29,000.
TOTAL	$257,600.

The Receiver in the Western jurisdictions therefore obtained for the merchandise sold over the counter and in the sale of the stores a total of $756,863.28.

The Pilcher Company had many creditors. There were 647 of them located all over the United States and their claims aggregated $751,860.09. [418]

The creditors have been paid two dividends; dividend No. 1 of 40%, amounting to $287,517.67; and dividend No. 2, amounting to $71,879.39, a total of $359,397.06.

All of the sixteen stores of the defendant Company were under long term leases. The obligations under these leases were considerable. But, fortunately, the sales of the stores were made in large part to individuals who desired to continue the stores and who assumed or took the burden of the obligations under the leases. Not one claim by any Lessor has been filed, except the claim of M. M. Berg of Turlock, California, whose claim was denied. The time within which to present claims

has long since elapsed and there is no further danger of swamping the estate with leasehold obligations.

Throughout the entire administration, up to the present time, I have acted as the attorney for the Receivers in the four Western jurisdictions. I have been obliged to employ local counsel at Portland, Oregon, at Seattle, Washington, and at Spokane, Washington, and with their assistance the legal affairs of the administration have been well taken care of.

My office is in Oakland, California, and in the administration of the estate in the ancillary jurisdictions of Oregon and Washington and California, I have made six trips to Portland, Seattle and Spokane, one trip to Los Angeles and one trip to Stockton. These trips have, in the aggregate, taken me out of the City of Oakland, and away from my office, sixty-four (64) days. It also became necessary for me to go to New York City for the purpose of attending and taking of depositions of Walter E. Ernst, William Fraser and Arthur F. Gotthold. This trip took me away from my office twelve (12) more days. In this estate I have therefore spent Seventy-six (76) days away from my office and outside of the City of Oakland.

I might add that I necessarily employed local counsel in the three northern jurisdictions, and I have incurred the obligation to pay them the reasonable value of their services, which we have agreed is the aggregate sum of $265. [419]

STATEMENT OF SERVICES RENDERED BY EDWARD R. ELIASSEN, ESQ., ATTORNEY FOR RECEIVERS A. F. LIEURANCE AND ARTHUR F. GOTTHOLD; IN THE MATTER OF THE RECEIVERSHIP OF THE R. A. PILCHER CO. INC:

1926

June 4.

Spent entire day consulting with and advising Mr. A. F. Lieurance, relative to the Receivership, explaining to him the duties involved and the obligations connected therewith.

Assisted Mr. Lieurance in drafting telegram to Hon. Augustus N. Hand, Judge of the United States District Court of New York City, acknowledging receipt of wire notifying Mr. Lieurance that he had been appointed Receiver; Mr. Lieurance's telegram to Judge Hand, notifying him that he had appointed Edward R. Eliassen as his attorney.

Arranged with Surety Company for bond of Mr. Lieurance as Receiver in the New York jurisdiction.

Drafted and sent telegram to Judge Hand, suggesting that the bond of Mr. Lieurance in the amount fixed by Order of the Court, has this day been forwarded by air mail.

Assisted in preparing and sending three-page telegram to R. A. Pilcher re notice of appointment, and necessity for complete control

of the administration in California, Oregon and Washington, by Mr. Lieurance.

Assisting in preparation of telegram to attorneys McManus, Ernst & Ernst, Esq., of New York City, notifying them of appointment of Edward R. Eliassen as his attorney.

Prepared and sent written notification to Sheriff's office at Stockton, California, stating that Receivers were appointed yesterday at New York and that Mr. Lieurance, my client, will now take full charge of all stores; requesting information concerning all attachments; names of attorneys representing plaintiffs; and also requestng copies of writs in each case.

Letter to Constable at Stockton, notifying him of the Order made yesterday in the Pilcher Company proceeding at New York, appointing Receivers, and stating that Mr. Lieurance, as Receiver, will now take full charge of the California stores of the corporation; also that I would like to know about any attachments levied against the Stockton store and would like to have the names of attorneys representing attaching creditors, and copies of writs in each case. [420]

June 5.

Assisted in drafting and sending telegrams to store managers of the 16 stores of the R. A. Pilcher Co. Inc., situate in California, Oregon and Washington, notifying them of the appointment of Mr. A. F. Lieurance as Re-

ceiver in the New York jurisdiction, together with Mr. Arthur F. Gotthold, and that Mr. Lieurance now takes charge of all the stores here; that until further notice the stores shall be kept in operation; directing moneys in bank and in stores to be sent hereafter to the Receivers, except $200. to be retained in each store as a revolving fund; directing full daily reports and remittances to be sent to Mr. Lieurance each day; and notifying them that further instructions will follow. These telegrams were sent to:

J. F. Holmes, Turlock, California;
H. L. Bonderant, Oroville, California;
A. B. Swanson, Stockton, California;
Mr. McDonald, Klamath Falls, Oregon;
Mr. Cramer, Roseburg, Oregon;
Mr. Maloney, Eugene, Oregon;
Mr. Eilkerson, Albany, Oregon;
Mr. Millard, Portland, Oregon;
Mr. J. E. Wood, Tacoma, Washington;
Mr. Higgins, Aberdeen, Washington;
Mr. Ostrich, Wenatchee, Washington;
Mr. Pearson, Everett, Washington;
Mr. Fortier, Bremerton, Washington;
Mr. Buchanan, Yakima, Washington;
Mr. Swanson, Monroe, Washington.

June 6. (Sunday)

Worked all day on law concerning Receiverships and in the preparation of papers for the institution of ancillary proceedings in the United States District Court in and for the

Northern District of California, the United States District Court in and for the District of Oregon; the United States District Court in and for the Western District of Washington; and the United States District Court in and for the Eastern District of Washington.

June 7.

Continued in the work of preparing papers for the institution of ancillary proceedings in the aforementioned jurisdictions. [421]

Assisted in the preparation and sending of telegrams to New York.

Assisted in preparation of telegram to A. V. Love of A. V. Love Dry Goods Company of Seattle, Washington, re attachments and threatened suits, and the avoidance of bankruptcy.

Prepared and sent telegram to Attorney Wm. W. Peterson of Pendleton, Oregon, re claim of one Gluck in the matter of a suit which had been threatened, asking about any contemplated action and that same be deferred.

Prepared and sent lengthy telegram to Attorney Merrick of Everett, Washington, regarding claim of H. Rosenthal & Sons, in the matter of which attachment was threatened; asking that attachment proceedings be postponed and giving information re affairs of Pilcher Company.

Prepared and sent lengthy telegram to Attorneys Williams and Davis, Everett, Washington, re claim of Security National Bank and

threatened attachment proceedings thereon, asking that same be deferred.

Prepared and sent telegram to Sheriff Hogan at Modesto, California, re appointment of Mr. Lieurance as Receiver.

Sent letter to Attorney Wm. Petersen at Pendleton, Oregon; Attorney Merrick, Everett, Washington; Attorneys Williams & Davis, Everett, Washington; confirming sending of telegrams and urging that action be deferred by them on their several claims.

Prepared and sent letter to J. F. Holmes, Manager of Turlock store, stating that he has already been notified of the appointment of Mr. Lieurance as Receiver, and that I represent Mr. Lieurance; that we have been informed that the store is under attachment; that I have gotten in touch with attorneys and attaching creditors and have arranged to have him substituted as Keeper in the place and stead of Sheriff's Keeper; suggesting in the event of further suits to notify me immediately and to send any copies of Summons and Complaint; making other observations concerning the affairs of the Company and the efforts to be made to conserve the business and its assets.

Got in touch with Attorney Stanley M. Arndt of Stockton, California, one of the attorneys for plaintiffs Humphreys & Matthews, in a case pending in San Joaquin County in the Superior Court, and obtained an agreement

from him that to save expenses of that store and [422] in lieu of Sheriff's Keeper, that the store Manager at Stockton, Mr. Swanson, be substituted; drew up stipulations in the premises and forwarded them to Mr. Arndt by Special Delivery for his signature.

Sent letter to Attorneys McNoble & Arndt, Stockton, California, re Humphreys & Matthews v. R. A. Pilcher Co. Inc, (Proceeding No. 20074, Superior Court of San Joaquin County, California), relative to attachment and withdrawal of Keeper from Stockton store, and giving general information relative to the Equity Proceeding.

June 7.

Called over long distance telephone Attorney Arndt of Stockton and had extended discussion concerning case instituted by him on behalf of Humphreys & Matthews and concerning the attachment and the Sheriff's Keeper in store, and obtaining from him his agreement to be hereafter reduced to writing, that the Sheriff's Keeper might be withdrawn from the store and the store Manager substituted.

Worked on pleadings and drafts of proposed Orders appointing Receivers in United States District Courts of the Districts of Oregon, Western Washington and Eastern Washington.

Consulted and advised with Mr. Lieurance far into the night, to the exclusion of all other business.

June 8.

Assisted Mr. Lieurence in preparing and sending lengthy telegram to A. V. Love of Seattle, one of the largest creditors of the Pilcher Company, concerning his opposition to the placing of the affairs of the Receivers in the hands of the San Francisco Board of Trade; notifying him as to his policy for the present in the matter of bills; notifying him of the restraining Order contained in the Order of appointment, restraining creditors and all others from commencing any actions or proceedings or instituting any actions or proceedings, etc.

Worked on pleadings and Orders re institution of ancillary proceedings in the Courts of Oregon and Washington. [423]

Received letter from H. R. Youngblood, Under-Sheriff of San Joaquin County, dated June 7, 1926, relative to stipulation for appointment of Keeper.

Received letter from Attorneys McNoble & Arndt, giving information re attachments on stores; requesting Mr. Eliassen and Mr. Lieurance to go to Stockton and suggesting that attachments cannot be made anyway where a Receiver has been appointed, and where Receiver has taken possession of property prior to attachment.

Obtained and examined copy of Complaint in attachment suit of E. H. Simard et al v. R. A. Pilcher Co. Inc. (Superior Court of San Joaquin County, Proceeding No. 20083).

Telephoned to Attorneys Woodward, Briggs & Blewett of Stockton, California, relative to this case.

Conferred and advised with Mr. Lieurance until a late hour, spending entire day and a good portion of the night in this Pilcher matter, to the exclusion of all other business.

June 9.

Assisted and advised with Mr. Lieurance in the matter of telegrams sent today to R. A. Pilcher re his co-operation and concerning the general policy for the administration of the estate intended for the benefit of the creditors and also of Mr. Pilcher.

Wrote to all of the sixteen store managers, asking them to forward to me at once all copies of Complaints, Summons, Writs of Wattachment, Notice of Lien, and dun letters and that they give me all data and information obtainable concerning these matters.

Wrote to Sheriff of San Joaquin County, asking for all information that he could give concerning levy under writs of attachment; threats of suit and attachments.

Wrote similar letters to the Sheriffs of Stanislaus and Butte Counties, California; Klamath County, Douglas County, Lane County,

Linn County, Umatilla County and Multnomah County, Oregon; Pierce County, Grays Harbor County, Chelan County, Snohomish County, Kitsap County and Yakima County, Washington.

Filed pleadings in United States District Court in and for the Northern District of California at San Francisco and made Motion for appointment of Receivers, and obtained Order appointing A. F. Lieurance and Arthur F. Gotthold as temporary Receivers, fixing their bonds in [424] the sum of $10,000. each; and containing injunctive provisions along the lines of the Order made by Judge Hand in New York; obtained certified copy of Order of appointment.

Prepared and gave instructions to United States Marshal at San Francisco re service on creditors of copies of Order.

Letter from Attorneys McNoble & Arndt at Stockton, re form of stipulations sent by me and received by them, and concerning changes desired by them.

Consulted and advised with Mr. Lieurance concerning various matters connected with the future of the administration and outlining plans mentioned therewith; spending the entire day and a good portion of the night in this matter, to the exclusion of all other business.

June 10.

Letter prepared and sent to the Clerk of the

United States District Court at San Francisco, handing him certified copy of the Decree made yesterday by the Court in proceeding in equity No. 1707, Sidney Gilson et al vs. R. A. Pilcher Co. Inc., appointing A. F. Lieurance and Arthur F. Gotthold temporary Receivers, and directing the Clerk's attention to that portion of the Order which enjoins, among other things, the issuance out of and Court of any execution, writ, process, summons, subpoena, replevin or attachment, as noted on page 4 of the Order, lines 15 to 18 inclusive.

Letter prepared and sent to Sheriff of San Joaquin County, sending him six certified copies of Order made at San Francisco on the 9th; suggesting that one of these copies is intended for him and that the other copies be served on Attorneys McNoble & Arndt, Humphreys & Matthews, Attorneys Woodward, Briggis & Blewett, R. A. Gildea, and Attorney John Kennedy; and calling his attention to that part of the Order commencing at line 25 on page 3 and continuing to and including the 18th line on page 4, and stating that the Order enjoins all persons, firms and corporations from instituting or prosecuting or continuing the prosecution of any pending actions, suit or proceedings at law or in equity, or under any suit against the said defendant, or from levying any attachments, executions, or other process upon or against

any other property of the defendant, or from taking or attempting to take into their possession any of the property of the said defendant and from issuing or causing the execution or issuance out of any court of any writ, process, summons, subpoena, replevin or attachment. [425]

Letter similar to the foregoing prepared and sent to Sheriff of Stanislaus County, California.

Letter prepared and sent to County Clerk of Stanislaus County, handing him copy of Order appointing temporary Receivers, and calling his attention to injunctive provisions therein contained.

Letter prepared and sent to County Clerk of San Joaquin County, covering the same matter, and handing him copy of Order.

Worked on pleadings and drafts of proposed Orders for use in jurisdictions of Oregon, Western Washington and administrations.

Examined law pertaining to ancillary receiverships and administrations.

Consulted and advised with Mr. Lieurance concerning various matters connected with the administration. On this day I spent over nine hours in this matter, to the exclusion of all other business.

June 11.

Assisted Mr. Lieurance in drafting telegram to A. B. Swanson of Stockton, and fifteen other store-managers, re Receivership and giving

his views in the matter of the bankruptcy petition filed in New York today.

Assisted Mr. Lieurance in drafting letters to all of the sixteen store managers.

Prepared and submitted to Mr. Lieurance statement of costs advanced in the United States District Court at San Francisco, to Clerk and U. S. Marshal, Sheriffs and Constables.

Letter prepared and handed to Mr. Lieurance re memoranda of costs.

Obtained and examined copies of pleadings in the case of G. Swanson, an attachment suit pending in Stanislaus County which was commenced on June 4, 1926.

Worked on pleadings and Orders, and conferred with Mr. Lieurance; spending ten hours this day in the Pilcher matter, to the exclusion of all other business except a few telephone calls. [426]

June 12.

Worked all day on papers intended for use in the matter of the institution of ancillary proceedings in the United States District Courts at Portland, Seattle and Spokane.

Left for Portland in the evening.

June 13.

En route to Portland.

June 14.

At Portland, Oregon.

Instituted ancillary proceedings and appeared before Judge Robert S. Bean and obtained

Order appointing Arthur F. Gotthold and A. F. Lieurance temporary Receivers and fixing their bonds in the sum of $10,000. each; restraining all creditors and others from prosecuting any actions or proceedings (following the lines of the orders made in New York City and San Francisco).

Arranged for bond of Mr. Lieurance and had same approved and filed.

Arranged with U. S. Marshal for service of copies of Orders.

Arranged for and obtained certified copies of Orders.

Interviewed H. S. Millard, Manager of Portland store, and conferred with him at length concerning creditors and concerning an action pending against the Pilcher Company in which Plowden Stott, Esq., with offices in the Yeon Building, Portland, Oregon, appears as the attorney for the defendant.

Called on Attorney Stott with Mr. Millard and had long interview concerning this unit.

Went to office of Portland Oregonian and arranged for publication of notices, forms of which were to be hereafter forwarded.

Called at office of Chamberlain, Thomas & Kraemer, attorneys for Wiley Investment Company, re proposed bond to be given Wiley Investment Company in the matter of lien. [427]

Assisted in the preparation and sending of telegrams to all store managers in Oregon

and Washington, asking them to meet Mr. Lieurance and me at Portland on Saturday, the 19th, for a conference and for instructions.

Met and conferred with a number of attorneys representing creditors, whose names I have mislaid or forgotten.

June 15.

At Seattle, Washington.

Instituted ancillary proceedings and appeared before Judge Jeremiah Neterer and presented him with application and obtained order appointing A. F. Lieurance and A. F. Gotthold temporary Receivers and fixing their bond in the sum of $10,000. each, designating Seattle Daily Journal of Commerce as the newspaper for the publication of notices and containing injunctive provisions similar to those contained in the Orders made at New York, San Francisco and Portland.

Arranged with Earl A. Davis, Manager of Globe Indemnity Co., Alaska Building, Seattle, for bond of Receiver Lieurance and had same approved and filed.

Arranged with Clerk of Court for certified copy of Order.

Arranged with U. S. Marshal for service of copies of Order.

Called at office of Seattle Daily Journal of Commerce and arranged for publication of notices.

Called at office of Mr. A. V. Love, of A. V. Love Dry Goods Company, one of the largest creditors of the R. A. Pilcher Co. Inc. and had long interview with him concerning the affairs of the Pilcher Company and the Receivership.

Attended with Mr. Love and Mr. Lieurance a meeting of the Seattle Merchants Credit Association called for the purpose of discussing the affairs of the Pilcher Company, and participated in a discussion giving my views of the situation as it then stood, and outlining plans for the future of the administration.

Consulted and advised with Mr. Lieurance.

Conferred with a number of attorneys representing creditors, whose names I do not now remember. [428]

June 16.

At Spokane, Washington.

Instituted ancillary proceedings and appeared before Judge J. Stanley Webster and obtained Order appointing A. F. Lieurance and Arthur F. Gotthold temporary Receivers, fixing their bonds in the sum of $10,000. each and containing the same restraint provisions as contained in the Orders previously secured in the other jurisdictions; and designating Spokane Weekly Chronicle as the Newspaper for the publication of notices.

Arranged for and obtained certified copies of Order.

Arranged with United States Marshal for service of copies of Orders.

Called at office of Spokane Weekly Chronicle and arranged for publication of notices.

Called on Mr. Meikle, Secretary of Spokane Merchants Association, with Mr. Lieurance, and on Fabian Dodds, Esq., attorney for the Association; also on Mr. J. D. Payne of the Crescent Dry Goods Company, and explained to them the situation, giving them our ideas concerning the outlook for the creditors and concerning the administration of the Receivers.

June 17.

At Seattle all days conferring with creditors and attorneys, and consulting with and advising Mr. Lieurance.

June 18.

At Seattle, starting for Oakland.

June 19.

At Portland, Oregon.

Attending with Mr. Lieurance a meeting lasting all day with the store managers of the Pilcher Company. Going over the situation of the affairs of the Company and giving advice.

June 20.

En route from Portland to Oakland. [429]

June 21.

En Route.

Letter received at my office from McManus, Ernst & Ernst of New York City, handing me bond of Receiver Gotthold for filing in Oregon, and asking for information concerning condition of stores.

June 22.

Returned from Portland and Northwest.

Wrote long letter to Attorneys McManus, Ernst & Ernst stating that we had just returned from the Northwest and suggesting that before going to the Northwest, we instituted ancillary proceedings in the United States District Court at San Francisco, and that in the Northwest we instituted similar proceedings in the United States District Courts at Portland, Seattle and Spokane; that in each jurisdiction we obtained Orders appointing A. F. Lieurance and Arthur F. Gotthold as temporary Receivers, without the appointment of any local Receivers; that certified copies of the Orders in the Northern California jurisdiction had already been served upon the Sheriffs, Constables and attaching creditors, and had been given to Clerks of various Courts within that jurisdiction, and reporting generally what had already taken place here in the West.

Received and examined bonds furnished at New York on behalf of Mr. Gotthold for use in the Western jurisdictions, and had them forwarded to the Clerks of the various Courts here in the West.

Consulted and advised with Mr. Lieurance the remainder of the day; spending eight hours this day in the matter of the affairs of the Pilcher Company.

June 23.

Prepared and had executed affidavits of mailing of notices to creditors; sent letter and affidavit of mailing to Clerk of the U. S. District Court at Portland requesting that affidavit be filed in the proceedings.

Conferred with Mr. Lieurance most of the day.

Worked on draft of proposed notice to creditors to be given of time and place for hearing on petition to make Receivership permanent. [430]

June 24.

Letter received from G. H. Marsh, Clerk of the U. S. District Court at Portland, acknowledging receipt of bond of Arthur F. Gotthold, and stating that Judge Bean approved same and that it had been filed.

Worked on draft of proposed application for Order in each of the Western jurisdictions, permitting Receivers to continue the operation of the business and to purchase merchandise.

Worked on draft of proposed Orders in the premises.

Consulted and advised with Mr. Lieurance for over three hours; spending seven hours in work of Pilcher matter.

June 25.

Went to Stockton, California, with Mr. Lieurance and Mr. Phillip A. Hershey, the Auditor, and spent all day; had conference with store manager; called at Sheriff's Office and presented written demand already prepared by me, that he turn over all of the moneys in his possession taken under attachments; went with him to his attorneys, Levinsky & Jones, Esq., and discussed matter of demand and the legal effect of the provisions of the Order of appointment concerning the property of the defendant Pilcher Company; called at office of Attorneys McNoble & Arndt in United Bank & Trust Bldg.; arranged for withdrawal from store of Sheriff's keeper and for the release of the attachment on the account of the Company in Bank of Italy; drafted, prepared and had signed Petition of Receivers for Order to Show Cause directed against Sheriff W. H. Reicks, Sheriff of San Joaquin County, directing him to show cause why he should not turn over all moneys in his possession under attachment to the Receivers.

Prepared draft of proposed Order to Show Cause to be directed against Sheriff Reicks.

Consulted and advised with Mr. Lieurance.

June 26.

Appeared before Judge St. Sure at San Francisco and presented Petition for Order to Show Cause and obtained such an Order,

directing Sheriff Wm. H. Reicks to appear before the Court on Wednesday, June 30, 1926, at the hour of two o'clock P. M.

Obtained certified copy of this Order and arranged for *it* service upon the Sheriff. [431]

Wrote letters concerning this Order and the date fixed for the hearing to the Sheriff's Attorneys, Levinsky & Jones, and to McNoble & Arndt, attorneys, and who represented one of the attaching creditors, sending them copies of the Petition and of the Order and calling their attention to the time fixed for the hearing.

Letter received from O. H. Fithian re Portland lease of Wright Shoe Co. with R. A. Pilcher Co. Inc.

Letter sent to Board of Trade at San Francisco, enclosing release of attachment signed by Sheriff Wm. H. Reicks, dated June 25, 1926, requesting that attachment be immediately released on both general and special accounts of Pilcher Company.

June 26.

Worked on form of notice to creditors to present claim.

Met and conferred with several attorneys representing creditors.

Consulted with and advised Mr. Lieurance for several hours.

June 29.

Had conference with Mr. Lieurance lasting all day, re condition of stores; re inventory of

all stocks and fixtures; re policy of administration.

Sent letter to Clerk of U. S. District Court at Spokane, acknowledging receipt of letter.

Received letter from Clerk of U. S. District Court at Spokane acknowledging receipt of five copies of Order which have been forwarded, as requested to Marshal for service.

June 30.

Appeared in Court at San Francisco before Judge A. F. St. Sure and made showing on Petition for Order authorizing Receivers to continue operation of stores of Pilcher Company and to purchase merchandise.

Obtained such an Order. [432]

Appeared also in Judge St. Sure's Court in the matter of the Order to Show Cause directed against Sheriff Reicks of San Joaquin County; on the request of McNoble & Arndt, representing one of the attaching creditors, the matter was continued until August 9th.

Prepared draft of proposed Petition and Order authorizing said Receivers to continue operation of stores and to purchase merchandise as needed, and sent same to Judge Neterer at Seattle, Judge Bean at Portland and Judge Webster at Spokane, with letters of explanation.

Had long conference with Attorney Walter E. Ernst of New York City, of the firm of McManus, Ernst & Ernst, and with Mr. Lieurance, discussing various matters relating to

the administration; this conference lasting far into the night.

Letter received from D. T. Ham, U. S. Marshal at Spokane, enclosing statement covering fees and costs of service.

July 1.

Long conference with Attorney Walter E. Ernst, one of the attorneys representing the New York Receiver.

Received telegram from U. S. Marshal at Seattle, giving estimate of Marshal's fee.

Wrote letter to Clerk of U. S. District Court at Portland, relative to Order and asking certified copy thereof.

Conferred with Mr. Lieurance and with Mr. Hershey re accounting and reports.

Met and conferred with several creditors in Mr. Lieurance's office.

Had long conference with Attorney Walter E. Ernst and with Mr. Lieurance concerning various matters connected with administration.

July 2.

Prepared and sent letter to G. H. Marsh, Clerk at Portland, enclosing check for $73.60 to cover fee for certification of copy of Order of June 14, 1926.

Received telegram from Clerk of Court at Portland, acknowledging receipt by Julge Bean of Petition of A. F. [433] Lieurance for leave to purchase merchandise, and stating that Order was signed as prepared by me and

that Petition and Order were filed July 2, 1926.

Met and conferred with two attorneys representing creditors in Mr. Lieurance's office.

Long conference with Mr. Lieurance and Mr. Ernst, which lasted the greater part of the day.

Sent check to U. S. Marshal at Seattle, enclosing check of $250, in payment of Marshal's fee.

July 3.

Prepared and sent lengthy letter to McManus, Ernst & Ernst, giving a full report and reporting attachment suit of Humphreys & Matthews brought June 3, 1926, for recovery of $3348.25, and that McNoble & Arndt appeared as attorneys for plaintiff. In this suit attachments were levied on June 3rd and a Keeper was placed in charge of the store. In this and in several other matters, the Sheriff had already taken into his possession the sum of $7839.51 and had levied upon two accounts of the Company in the Bank of Italy at Stockton. The report was made, also, to the claim of Schuler-Ruh Co., upon which suit had been brought on June 7, 1926. Guard C. Darrah, Esq., appeared as attorney for plaintiff and caused attachments to be levied. I also reported an attachment suit then pending growing out of the claim of H. Rosenthal & Sons Inc. and Lew L. Gluck (both previously assigned to

G. Swanson); of E. A. Simard and W. W. Mathes for the recovery of $993.90; also the suit commenced in the Superior Court of San Joaquin County by Attorneys Woodward, Briggs and Blewett, on behalf of their client, in which attachments were levied; also suit of Grace Cutting, as assignee of Haymon-Krupp Co., for $1244.39, pending in Superior Court of San Joaquin County, California, attorneys for the plaintiff being J. W. Brown and W. H. Chamberlain, Esqs., and attachments also having been levied in this case; also suit of C. B. Sherman and R. G. Wise, reduced to judgment; attachments were levied in this case also. Also attachments suit of R. A. Gildea for $3,000., pending before the institution of Receivership proceedings, in which Attorneys Foltz, Rendon & Wallen appeared as attorneys for the plaintiff; also the claim of Lamb & Horrocks, for $1801.90, for labor and materials claimed to have been furnished in connection with store fixtures in the Elks' Building, Aberdeen, Washington; also claim of L. A. McCullough for labor, work and materials furnished in connection with Aberdeen store.

Worked on preparation of notice to creditors. [434]

Received wire that Judge Neterer of Seattle had this day signed Order which I had previously sent to him for his signature, author-

izing the continued operation of the stores and the purchase of necessary merchandise in connection therewith.

July 5.

Worked most of the day on the law concerning Receiverships and ancillary administrations.

Spent some time in the examination of leases on the Pilcher stores in California.

Received letter from G. H. Marsh, Clerk of Court at Portland, concerning receipt of exemplified copies of pleadings and stating that they had been filed.

July 6.

Spent all day examining leases and consulting with Mr. Lieurance and with Attorney Walter E. Ernst of New York.

July 7.

Continued with examination of leases and had long conference with Attorney Ernst of New York.

July 8.

Received wire from Clerk of Court at Seattle, acknowledging receipt of five additional copies of Order and notifying me that Joseph Lowenthal, creditor, is located at Yakima and not at Seattle.

Continued examination of Pilcher Company leases.

Had long conference with Mr. Lieurance and Mr. Hershey and with Attorney Walter E. Ernst of New York.

July 9.

Received telegram from Attorney Stott of Portland, notifying me that Wiley Investment Company, owner of Pilcher Co. store at Portland, has served written [435] notice that lease will be cancelled unless lien of Kilgreen & Flynn is removed; stating that original lease, and in all sub-leases, the lessee agrees to keep the property free from liens and that a failure to remove the same operates as a cancellation and termination of the original lease and all sub-leases; that lien of Kilgreen & Flynn amounts to $6102.37; suggesting also that there is question as to whether or not lien could be successfully foreclosed, but that the creditors should either be paid in full and the lien released, or a bond given to pay same in the event of judgment; suggesting also that he had obtained a week extension and that he would await instructions from me.

Wrote letter to U. S. Marshal at Portland, acknowledging receipt of his telegram of July 8th and sending him Receiver's check as requested, to cover Marshal's fee.

Received letter from Attorneys Simon, Gearin, Humphreys & Freed, of Portland, Oregon, enclosing copy of lease of Wright Shoe Co. and the Pilcher Company.

Received letter from O. H. Fithian dated July 7, 1926, re above mentioned lease.

Continued examination of leases and examined the law concerning certain provisions.

Conferred and consulted with Mr. Lieurance for several hours.

July 10.

Continued examination of leases and the law relating to certain provisions thereof.

Telegram received from Harry C. Clark, Clerk of Court at Spokane, in reply to my wire, stating that Judge Webster would hear motion on July 28, 1926; and also stating that Judge Webster had signed Order today granting Receiver Lieurance the right to purchase merchandise, and that this Order had been filed.

Conferred and advised with Mr. Lieurance and Mr. Hershey for several hours.

July 12.

Received telegram from G. H. Marsh, Clerk of Court at Portland, in reply to a wire from me, that Judge Bean would be in Portland on Monday, July 26. [436]

Received wire from Clerk of U. S. District Court at Seattle, that the date mentioned in my request for a hearing, will not be agreeable for the reason that Judge Neterer will be in Tacoma at that time.

Prepared affidavit of mailing notices to creditors of time fixed for hearing on appointment of permanent Receivers in the U. S.

District Court of Northern California, at San Francisco.

Had long conference with Mr. Lieurance.

July 13.

Met three creditors and one attorney in the office of Mr. Lieurance, and conferred with them at some length.

Telegram received from U. S. Marshal at Portland, re his account for services.

Consulted and advised with Mr. Lieurance and Mr. Hershey for upwards of two hours.

July 14.

Continued examination of Pilcher leases.

Consulted and advised with Mr. Lieurance for several hours.

July 15.

Spent most of day in consultation with Mr. Lieurance and Mr. Hershey and in the examination of Pilcher leases.

Received letter from Attorneys McNoble & Arndt, dated July 14, 1926, enclosing so-called "Priority Claim" of Dave Matthews, and stating that this was presented pursuant to the suggestion of Mr. Walter E. Ernst; requesting check in payment thereof and confirming our understanding over the telephone concerning the attachment costs.

July 16.

Spent most of day working on drafts of proposed Orders continuing Receivers and in the

examination of the law in the premises. [437]

Received telegram from Attorney Plowden Stott of Portland, suggesting that Royal Indemnity Company of San Francisco will make arrangements with me concerning bond in lien matter of Kilgreen & Flynn.

Wire received from Attorney Stott concerning telegram of the 15th.

Received letter from Attorneys Simon, Gearin, Humphreys & Freed of Portland, sending me copy of lease and asking where claim of their client should be sent.

Letter dated July 14th received from Attorneys Bronson, Robinson & Jones, of Seattle, re claim of Harper-Buchner Co.

July 17.

Worked on preparation of first Report of Receivers for filing in U. S. District Court at San Francisco.

Consulted and advised with Mr. Lieurance for several hours.

July 18. (Sunday)

Worked all day on preparation of Report of Receivers.

July 19.

Consulted with Mr. Lieurance and Mr. Hershey, and worked all day on Report of Receivers to be filed in the U. S. District Courts at San Francisco, Portland, Seattle and Spokane.

July 20.

Worked all day on Reports of Receivers.

July 21.

Continued to work on first Report of Receivers.

Consulted and advised with Mr. Lieurance for several hours. [438]

July 22.

Prepared and had completed Reports of Receivers for use in Western jurisdictions.

Letter received from McManus, Ernst & Ernst, dated July 16, 1926, stating that in compliance with my telegraphic request, they are sending me six additional copies of Order appointing Receivers.

July 23.

Prepared and sent letter to Clerk of U. S. District Court at Portland, notifying him that we have sent, under separate cover, application for an Order making Receivers permanent, and suggesting that we would like to have the motion heard on Monday, July 26th, if possible.

Prepared notice to creditors of application to make Receivers permanent.

Wrote letter to Portland Oregonian, enclosing draft of proposed notice and asking that it be published in that paper once a week for four weeks, and that the publication be started at once.

Consulted and advised with Mr. Lieurance for several hours.

July 24.

Letter prepared and sent to McNoble & Arndt, Esqs., Stockton, California, handing them check of receiver for $1,000 as compromise settlement in the matter of the suit of Humphrys and Matthews, and in full settlement of priority claim; stating our understanding that upon receipt of this money, all attachments levied in the suit shall be released.

Letter received from McManus, Ernst & Ernst, stating that they are sending me additional copies of Orders making Receivership permanent in New York jurisdiction, and enclosing letters for reply received from A. V. Love Dry Goods Company; Schall Mfg. Co.; F. M. Hoyt Shoe Co. and the Multigraph Co.

Consulted and advised with Mr. Lieurance for several hours and left in the evening for Portland, Oregon. [439]

July 25.

En route to Portland, Oregon.

July 26.

At court at Portland.

Presented application for Order making Receivers permanent and obtained Order signed by Judge Bean.

Obtained certified copy of this Order and served copy thereof on local office of Bonding Company that furnished bond of Receipt Lieurance.

Received at Portland and duly considered a lengthy wire from Attorney Stanley Arndt of Stockton, California, forwarded to me in care of Judge Bean's Court at Portland, relating to check received from Receivers and suggesting that attachments be not released at once; that he will make no appearance in Court at San Francisco on August 9th and we will then be entitled to Court order requiring Sheriff of San Joaquin County to turn over moneys to Receivers.

July 27.

At Court in Seattle.

Presented application for Order making Receivers permanent. Hearing continued until July 29th.

Left for Spokane.

July 28.

At Court at Spokane.

Presented application to make Receivers permanent and obtained such an Order.

Obtained certified copies of Order and served one copy thereof on local office of Bonding Company which furnished bond of Receiver Lieurance.

Received at office letter from McNoble & Arndt, confirming telegram sent; acknowledging receipt of check; and suggesting that attachment be continued that *that* they will make no appearance upon the hearing of the Order to Show Cause directed against Sheriff Reicks. [440]

July 29.

In Court at Seattle.

Presented application for Order making Receivers permanent and obtained Order as prepared.

Obtained certified copies of Order and served one copy thereof, as required, on bonding company at Seattle which furnished bond of Receiver Lieurance.

Letter sent from my office to Attorney McNoble & Arndt of Stockton, California, acknowledging receipt of their letter of July 27th, and stating that upon my return from the Northwest the matter mentioned would be called to my attention.

July 30.

Left Seattle for Oakland.

Received at office telegram from Portland, Oregonian stating that the 65 proof slips of Notice being published are being sent me today.

Received letter from U. S. Marshal at Spokane enclosing statement covering fees and costs.

July 31.

En route from Seattle to Oakland.

Received at office telegram from R. T. Cookingham, Sheriff at Pendleton, Oregon, stating that unless taxes amounting to $1244. are paid by Thursday, he will take over store.

Received at my office, telegram from Attorney Stott acknowledging wire of even date and

stating that Sheriff of Umatilla County will accept check for $523.32 for 1925 taxes and interest to date, and will take no action if such check if received by Saturday this week; stating that the Board of Equalization meets on September 13; stating also that the Sheriff suggested that the 1926 taxes seemed pretty high.

August 1.

En route from Seattle to Oakland. [441]

August 2.

Letter dated July 7th, received from Attorney Plowden Stott of Portland, re bond of Receivers given to Wiley Investment Company, together with six copies of bond; also copies of letters to Attorneys Chamberlain, Thomas & Kramer, and Milarkey, Seabrook & Dibble, concerning this bond matter; also concerning payment of premiums on bond for release of attachment on Portland store; also concerning appointment by me of Mr. Stott as my local counsel in Oregon.

Letter dated July 27th received from G. H. Marsh, Clerk of Court at Portland, sending me three certified copies of the Order appointing Receivers.

Letter dated July 30th from Plowden Stott, requesting sending of check to Martin & Campbell to cover premium on Receiver's bond given to Wiley Investment Co.

August 3.

Prepared and sent letter to Attorneys McManus, Ernst & Ernst, at New York City, notifying them of the Order made by the U. S. District Court of Oregon on July 26th, making Receivers permanent; of Order made on July 29th at Seattle and of Order made on July 28th at Spokane; with this letter I sent certified copies of the Order made in California, Oregon, Western and Eastern Washington, making the Receivers permanent, and requested McManus, Ernst & Ernst to serve on Bonding Company at New York which furnished bond of Arthur F. Gotthold these certified copies thereof.

Served on office of Globe Indemnity Company, which furnished bonds of Mr. Lieurance, as temporary Receiver, certified copies of Orders by the U. S. District Courts at San Francisco, Portland, Seattle and Spokane, making Receivers permanent.

Prepared and sent letter to Attorney Stott replying to his letters of July 27th and 30th sent me while I was attending to Pilcher Company business in the Northwest, and suggesting that the Auditor for the Receivers had already sent check to N. E. Newland Co. covering premium on bond given for the release of the attachment placed against the Portland store; suggesting that their bill for bond against lien will be paid through the Oakland office of the Globe Indemnity Com-

pany in accordance with understanding, and suggesting that as soon as I can get information concerning the lien against the Eugene store of the Pilcher Company, I will forward it to him.

Consulted and advised with Mr. Lieurance for several hours. [442]

August 4.

Continued examination of Pilcher Company leases and the law respecting the same.

sent

Letter/to Attorneys McNoble & Arndt of Stockton, replying to theirss of July 27th,; stating that their suggestion as to the filing of releases is a good one and that nothing further will be done until the hearing on the Order to Show Cause on August 9th.

Met and conferred with several creditors of the Pilcher Company in the office of Mr. Lieurance.

Consulted and advised with Mr. Hershey, the Auditor.

Letter sent to U. S. Marshal at Spokane, enclosing check in the sum of $77.45 in payment of fees and expenses.

August 5.

Letter dated August 3rd received from Clarence R. Hotchkiss, Marshall at Portland, re additional costs.

Letter received from Attorneys Levinsky & Jones of Stockton, California, enclosing An-

swer of respondent, Sheriff Wm. H. Reicks of San Joaquin County in the matter of the Order to Show Cause set for hearing next Monday; suggesting that the matter may be submitted then; asking me to admit service on original and cause it to be filed; also asking me to advise them of the result of the Order to Show Cause matter.

Examined with care the Answer of Sheriff Reicks to the Order to Show Cause which comes up next Monday, August 9th, in the U. S. District Court at San Francisco.

Letter dated August 4th received from Globe Indemnity Company, acknowledging my letter of the 3rd enclosing certified copies of the Orders made by the U. S . District Courts in the Northern jurisdictions on July 26th, 28th and 29th.

Consulted and advised for several hours with Mr. Lieurance and Mr. Hershey.

August 6.

Continued examination of Pilcher Company leases.

Letter sent to Seattle Daily Journal of Commerce requesting that 85 more proof slips of Notice to Creditors be sent to this office at once. [443]

Letter sent to U. S. Marshal at Portland re check for balance of account.

Letter sent to Attorneys Levinsky & Jones of Stockton, California, replying to their letter

of the 5th inst., and stating that I had written my admission of service upon the original Answer of the Sheriff and had it filed in the Order to Show Cause proceeding.

Had long conference with Mr. Lieurance and Mr. Hershey.

August 7.

Letter prepared and sent to Portland, Oregonian, stating that we had not received proof slips of publication of Notice and that we are in need of 65 slips at once.

Letter to Oakland Tribune enclosing draft of Notice to be published in that paper once a week for four weeks and asking that publication start at once.

Letter to Spokane Weekly Chronicle, stating that proof slips had not been sent us and requesting that they be sent at once.

Letter dated August 7th received from Globe Indemnity Company, requesting execution of application blank for bond of Receiver.

Consulted and advised at some length with Mr. Lieurance.

August 9.

Appeared in U. S. District Court at San Francisco in matter of Order to Show Cause directed against Sheriff Reicks of San Joaquin County, California, which was originally on the calendar for June 30th and which was continued to this day. At the request of Attorney Henry Dinkelspiel, claiming to repre-

sent Gildea & Co., one of the attaching creditors, the matter was put over one week.

Letter sent to Sheriff of Stanislaus County, California, sending Stipulation in the matter of Humphreys & Matthews vs. Pilcher Company, stipulating that the moneys in his hands under attachment may be turned over to Receiver Lieurance; also asking him to forward moneys at once in accordance with stipulation.

Letter to Sheriff of San Joaquin County, enclosing Stipulation in the case of Humphreys & Matthews, relating to release of attachments and asking for remittance. [444]

Letter sent to Attorneys McNoble & Arndt at Stockton, California, re Humphreys & Matthews, stating that Attorney Henry Dinkelspiel of San Francisco, is appearing for one of the attaching creditors, and that he is making some opposition to the Order to Show Cause; also that he had asked for a continuance which had been granted him, and stating that I am today sending stipulations concerning release of attachments to the Sheriffs of San Joaquin and Stanislaus Counties.

While at U. S. District Court in San Francisco, I presented application for Order making Receipers permanent which said Order was granted.

Had several *conference* with Mr. Lieurance during day.

August 10.

Wrote letter to Mr. Lieurance, suggesting that while at San Francisco*n* on Monday, August 9th, application was made on his behalf for an Order making the Receivers permanent; that I had obtained such an Order and certified copies thereof, and had served a copy thereof on the Globe Indemnity Company, and had forwarded another certified copy to Attorneys McManus, Ernst & Ernst to be served on the Bonding Company that furnished Mr. Gotthold's bond in this jurisdiction; also notifying him that Attorney Henry Dinkelspiel, representing Gildea & Co., came into the matter in the Order to Show Cause directed against Sheriff Reicks of San Joaquin County, and that at his request a continuance of the Order to Show Cause was had and the matter was put over until Monday, August 16th.

Prepared and sent letter to McManus, Ernst & Ernst at New York notifying them that Judge St. Sure had made an Order making the Receivers permanent and also stating that the matter of the Order to Show Cause, directed against the Sheriff of San Joaquin County, was continued one week at the request of Attorney Dinkelspiel; also sent certified copy of Order making receivers permanent for service upon Bonding Company at New York.

Caused certified copy of Order made at San Francisco on the 9th, to be served on the Globe Indemnity Company.

August 11.

Spent all day in conference with Mr. Lieurance and Mr. Hershey. [445]

August 12.

Continued examination of leases covering Pilcher Company stores, and examination of law connected therewith.

Letter received from Spokane Weekly Chronicle enclosing statement for publication of notice amounting to $6.03; stating that affidavit of publication would be made at date of last publication.

Letter dated August 10th received from Attorney J. K. Carson, Jr., concerning claim of his client, the Stage Publishing Company.

Had several *conference* with Mr. Lieurance during the day.

August 13.

Wrote letter to Attorney Plowden Stott at Portland relative to sundry matters, including claim against the store at Eugene, Oregon.

Letter received from Globe Indemnity Company, dated August 11th, acknowledging receipt of certified copy of Order of the U. S. District Court of Northern California, dated August 9, 1926.

August 14.

Wrote letter to Attorney J. K. Carson, Jr., of

Portland, relative to the claim of the Stage Publishing Co., and stating where claim is to be presented and that it will be considered in the due course of the administration.

Letter dated August 10th received from Attorney Stott in reply to mine of August 3rd, and stating that there are no new developments except that the attorneys for Kilgreen & Flynn are disturbed over the fact that we had given a bond to the Wiley Investment Company.

August 16.

Examined law concerning priority of claims.

Letter to Spokane Daily Chronicle acknowledging receipt of theirs of August 12th and enclosing check in the sum of $6.03 in payment of bill.

Conferred several times during day with Mr. Lieurance and Mr. Hershey; spending five hours in all on Pilcher Company matters. [446]

August 18.

Conferred with Mr. Hershey.

Spent several hours with Mr. Lieurance in consultation.

Examined a number of creditors' claims.

August 19.

Examined number of claims of creditors.

Letter sent to Sheriff of Stanislaus County, reminding him that we sent stipulation au-

thorizing him to turn over certain moneys under attachment to Receiver A. F. Lieurance and suggesting that so far we had had no word; also requesting him to forward moneys at once.

Had several conferences during day with Mr. Lieurance.

August 21.

Letter received from Attorney Joseph Kirk of the San Francisco Board of Trade, stating that he had called a meeting of the creditors who had filed claims with the Board of Trade, asking them to meet with Mr. Lieurance and me on Tuesday, August 24th.

Spent several hours with Mr. Lieurance in consultation.

August 23.

Received and examined Notice of Lien of F. W. MacEachron (doing business under firm name and style of Hoquiam Electric Company); this lien being based upon claim for electric fixtures, the value of which he claims to be $526.82.

Letter sent to Globe Indemnity Company, stating that bond had been just reecived from New York; that bond was not suitable for that jurisdiction and enclosing same for credit.

Letter sent to Attorneys McManus, Ernst & Ernst, acknowledging receipt of bond returned and stating that bond had been returned to Bonding Company for credit.

Letter received from McManus, Ernst & Ernst, dated August 18th, acknowledging receipt of my letter of the 10th enclosing copy of Order making Receivers permanent, [447] and stating that they are serving copy of Order on the Surety Company that went on Mr. Gotthold's bond; also stating that similar notices, in response to my letter of the 3rd, had been served.

Letter dated August 18th received from McManus, Ernst & Ernst, returning Surety Company bond requested by me in my letter of the 3rd.

Examined and passed upon several claims of creditors.

Consulted and advised with Mr. Lieurance for several hours.

August 24.

Met with Mr. Lieurance at the office of San Francisco Board of Trade and went over matters in general with the few creditors who were then present.

August 25.

Examined a number of creditors' claims and passed upon them.

Conferred several times during day with Mr. Lieurance and Mr. Hershey.

Further examination made of law relative to priority claims.

August 26.

Called at office of Attorney Joseph Kirk, of San

Francisco Board of Trade, and gave me copies of Orders made in the Various administrations, together with copies of some correspondence, and discussed at some length with him and Mr. Lieurance the advisibility of selling the stores.

Wrote another letter to the Portland Oregonian, calling attention to our previous requests for proof slips and urging that they be sent at once.

Letter received from Oakland Tribune, enclosing 200 copies of notice being published in that paper. [448]

August 27.

Sent letter to U. S. Marshal at San Francisco acknowledging receipt of check of $73.50 as rebate on account of deposit.

Sent telegram to Portland, Oregonian, demanding immediate mailing of proof slips of publication as previously *request.*

Wrote letter to Attorneys Simon, Gearin, Humphreys & Freed, acknowledging receipt of copies of lease made between Wright Shoe Company and R. A. Pilcher Co. Inc. under date January 19, 1926, and suggesting that the claim of their client be forwarded to the Receiver, A. F. Lieurance, at Oakland.

Prepared and sent letter to O. F. Fithian at Portland, acknowledging receipt of Pilcher lease.

Letter received from Attorney W. J. Brown of Modesto, California, re suit against Pilcher

Company instituted by him on behalf of client, in Superior Court of Stanislaus County, and giving at length his views of the claim of his client and his reasons for considering the claim one entitled to priority.

Consulted several times with Mr. Lieurance and Mr. Hershey during day.

August 28.

Letter received from Attorneys Dinkelspiel & Dinkelspiel of San Francisco, stating that they had had telephone conversation with Attorney Arthur Levinsky of Stockton re Order to Show Cause directed against Sheriff Reicks to the effect that the Sheriff cannot be in Court next Monday and requesting that matter go over one week.

Conferred with Mr. Lieurance several times during day.

August 30.

Letter received from Attorneys Dinkelspiel & Dinkelspiel re Order to Show Cause in the Sheriff Reicks matter.

Attended Court in the matter of Order to Show Cause and consented to continuance of one week.

Had long conference with Mr. Lieurance during afternoon. [449]

August 31.

Received and examined wire from Sheriff Cookingham of Pendleton, Oregon, threatening to close Pendleton Store unless tax

of $1244. be paid by Thursday noon, September 2, 1926.

Prepared and sent telegram to Attorney Plowden Stott, my local counsel at Portland, Oregon, notifying him of above threat; stating that I understand Board of Equalization meets in September and that we desire to present matter of tax to said Board for the reason that tax now demanded includes assessment for previous year upon previous store not owned by Pilcher Company, and requesting that Mr. Stott, if possible, arrange with Sheriff to defer threatened action until matter of validity of tax is determined.

Sent letter to Sheriff Cookingham concerning the foregoing.

Sent letter to Attorney Plowden Stott, confirming telegram mentioned above.

Wrote letter to Attorney Joseph Kirk of San Francisco Board of Trade, re suggestion of Mr. Walter E. Ernst as to association of Mr. Kirk with me, and stating that if such association would mean a payment of part of my fee to him, that I would prefer not to have this assistance.

Sept. 1.

Prepared and sent lengthy telegram to Attorney Stott at Portland, suggesting my belief that service upon the Tax Collector, Assessor and Sheriff in the tax matter, might prevent authorities from taking over the

store as threatened; stating my belief that the 1925 tax should be assessed to and paid by the Crescent Dry Goods Company; suggesting also that if payment be made now, it must be under protest.

Received and considered telegraphic reply from Attorney Stott, suggesting that we make payment under protest and that by so doing we may expect a substantial reduction in the amount of the 1926 tax; suggesting also that the Board of Equalization meets on September 13th.

Letter dated August 27th received from Portland Oregonian re proof slips, and affidavit of publication.

Sent letter to Attorney W. J. Brown of Modesto in reply to his asking for his views in the matter of the claim of his client. [450]

Conferred several times during day with Mr. Lieurance and Mr. Hershey.

Sept. 2.

Prepared and sent wire to Attorney Plowden Stott notifying him that check of Receivers to take care of 1925 tax was being forwarded today; that payment is made under protest and that we will furnish information to him for use at the hearing of the Board of Equalization on the 13th.

Received telegram from Attorney Stott at Portland that 1925 tax can be collected by levy against fixtures and other personal prop-

erty in the possession of the Pilcher Company on March 1, 1925, and suggesting that we give him further information concerning ownership of store previously operated by the Crescent Dry Goods Company.

Prepared and sent letter to R. T. Cookingham, Sheriff of Umatilla County, Oregon, enclosing check for $523.32 to cover taxes for 1925 on Pendleton store; asking for information as to the Crescent Dry Goods Company; its present location and the names and addresses of its members.

Conferred several times during day with Mr. Lieurance.

Sept. 3.

Left for Los Angeles for purpose of conferring with Attorneys Lowenthal, Collins & Lowenthal representing the Weber Showcase & Fixture Company relative to a possible adjustment of their client's claim.

Sept. 4.

At Los Angeles, California, re Weber Showcase & Fixture Company claim; called upon and had long conference with Attorney Victor Ford Collins of the said firm and made proposition with a view toward and adjustment.

Sept. 5.

At Los Angeles. Awaiting further conference with Attorney Collins re Weber Showcase & Fixture Company claim, to take place on following day. [451]

Sept 6.

At Los Angeles, California, conferring with Attorney Collins in an effort to bring about an adjustment of the claim of Weber Showcase & Fixture Company against fixtures in various stores of Pilcher Company.

Received letter at office dated September 3rd from Attorney Plowden Stott, acknowledging my wire of the 2nd from Los Angeles and advising me concerning law in Oregon relative to the procedure in connection with petitions for tax reduction.

Sept. 7.

Conference lasting four hours with Mr. Lieurance.

Sept. 8.

Received letter dated September 7th from Sheriff of Umatilla County, Oregon, enclosing tax receipts and informing me that the head of Crescent Dry Goods Company is Charles Bond of Bond Bros., Pendleton, Oregon.

Several conferences with Mr. Lieurance during the day.

Sept. 10.

Letter sent to Clerk of U. S. District Court at San Francisco, enclosing four copies of Order continuing Receivers to be certified and returned.

Two letters received from Lowenthal, Collins & Lowenthal, attorneys at Los Angeles, relative to the claim of the Weber Showcase & Fixture Company; setting forth various

charges and credits in the matter; expressing views as to the status of the claim and offering a five per cent reduction as a settlement basis.

Several conferences with Mr. Lieurance during the day.

Sept 11.

Letter received from Globe Indemnity Company relative to bonds of Receivers. [452]

Sept. 13.

At Court in San Francisco re Order to Show Cause directed against Sheriff Reicks of San Joaquin County. Matter was further continued.

Several conferences with Mr. Lieurance during day.

Sept. 14.

Prepared and sent wire to Attorney Stott at Portland, stating that we are sending check to cover 1926 taxes but that payment is made under protest; also asking Mr. Stott to file petition for tax reduction.

Received and examined telegram from Tax Collector at Klamath Falls, Oregon, suggesting that he will attach Pilcher Company store at Klamath Falls if payment of current taxes is not made by tomorrow.

Prepared and sent to Attorney Stott telegram advising him of this threat and asking him to arrange for extension of time so that we can take the matter up with the Board of Equalization.

Sent letter to Plowden Sott, stating that we have information obtained through Mr. Pilcher that there was an understanding between him and Charles Bond, of Bond Bros., Pendleton, that the 1925 taxes on the Pendleton store were to be divided as follows: one third thereof to be paid by the Pilcher Company and two-thirds thereof by Crescent Dry Goods Company; also suggesting that we are entitled to reimbursement and that I am writing to Mr. Bond today; also confirming wire sent today concerning taxes against Klamath Falls store.

Letter received from Attorneys Dinkelspiel & Dinkelspiel of San Francisco, relative to authorities to be submitted by them to me as to alleged priority of claim of their client, Gildea & Co.

Several conferences with Mr. Lieurance, consuming over four hours.

Sept. 15.

Wrote letter to Seattle Daily Journal of Commerce, enclosing notice to be published and request for 90 proof slips.

Wrote letter to Spokane Daily Chronicle enclosing notice to be published and asking for 10 proof slips. [453]

Wrote letter to Oakland Tribue enclosing notice to be published at once, and request for 100 proof slips.

Wrote letter to San Francisco Examiner, en-

closing notice to be published at once, and to continue until October 1st.

Wrote letter to Attorney Joseph Kirk of San Francisco Board of Trade, suggesting that the Order to Show Cause against the Sheriff of San Joaquin County had been continued from time to time and that it would be on the calendar again*st* on Monday, September 20th; suggesting also that I understood that yesterday Mr. Lieurance was in conference with him and Mr. Moore and that it was agreed among these gentlemen that all of the stores should be sold; and suggesting further that notices be prepared notifying the public that the stores would be sold by the Receivers here on the Pacific Coast, suggesting further that I had prepared such notices and that I am handing copies thereof to him for his approval and suggesting that I would welcome any suggestions that he might have to make in the premises.

Prepared notices of sale of stores for publication in newspapers in all Western jurisdictions.

Received telegram from Mr. Stott in reply to my wire, stating that he has prepared petition for reduction of Klamath Falls taxes and asking for information concerning the values of stocks and fixtures at the Pendleton store.

Letter sent to Attorney Stott re notice to creditors to be published in the Portland Orego-

nian; the notice to be published daily until October 1st; also asking for 100 proof slips of publication.

Had several conferences during the day with Mr. Lieurance.

Sept. 17.

Prepared and sent letter to Mr. A. V. Love of Seattle, re receipt of his claim for the necessary expenses incurred by him in his recent trip to New York on behalf of the Receivers, and suggesting that the claim would receive favorable action; among other things stating that he had taken up this matter with Attorney Walter E. Ernst of New York of the firm of McManus, Ernst & Ernst, representing the Receivers in the New York jurisdiction, and that he too had suggested that his (Mr. Love's) claim should be paid in full. [454]

Sent letter to Attorney Stott re taxes levied in Umatilla County; also re letter received from W. A. Weist, Deputy District Attorney, stating that it is necessary to take some action concerning taxes amounting to $677.97 levied against the Klamath Falls store; also suggesting that I communicate with Mr. Weist.

Sent letter to Attorney Stott re trip of Mr. Hershey, Auditor for the Receivers, to Portland in the interests of the administration.

Several conferences with Mr. Lieurance during the day.

Sept. 20.

At Court in San Francisco in the matter of the Order to Show Cause against Sheriff Reicks of San Joaquin County, California. Matter continued.

Conferred all afternoon with Mr. Lieurance relative to divers and sundry matters connected with administration.

Sept. 21.

Had several conferences with Mr. Lieurance during day.

Sept. 22.

Prepared and sent letter to Attorney Charles A. Hardy of Eugene, Oregon, in response to his letter addressed to Mr. Lieurance under dates July 7 and August 30, concerning claim of Stein Bros. vs. Pilcher Company, and also claim of Mr. Laraway and statement that Mr. Laraway had threatened to file a lien against the Eugene store property. I suggested that the action on the lien be deferred until we again hear from Mr. Gotthold as to his views concerning the sale of all the stores, and suggested in the event of the sale of the Eugene store, the purchaser might be interested in the lease and in taking care of the obligation.

Letter sent to Attorney W. J. Brown of Modesto, concerning scope of equity proceeding, and attempting to explain the bankruptcy proceeding, and giving him my views concerning the right of the Receivers under

the Order of appointment to all moneys under attachment. [455]

Telegram sent to Attorney Lowenthal, Collins & Lowenthal, at Los Angeles, stating that the Receivers were offering all the properties of the Pilcher Company for sale but that the sales will be made subject to their leasehold rights in the fixtures in some of the stores; that no attempt would be made to sell any of the fixtures under lease contract and stating further that the Receivers would be willing to settle with their client, Weber Showcase & Fixture Company, on a basis of 50% of the claim.

Telegram received from Lowenthal, Collins & Lowenthal stating that Weber Showcase & Fixture Company had heard report that Receivers are attempting to sell stores of the Pilcher Company and asking for full particulars.

Letter sent to Attorneys Dinkelspeil & Dinkelspiel in reply to their letter of the 14th, asking for their authorities re Gildea claim.

Letter sent to Attorneys Lowenthal, Collins & Lowenthal suggesting that Receivers are not willing to accept discount of only five per cent and that any further attempt to settle on a basis of less than 50% would be without avail.

Sept. 23.

Several conferences with Mr. Lieurance during day.

Sept. 24.

Letter dated September 20th received from Attorney Plowden Stott re taxes in Umatilla County and Klamath Falls and relating to the petitions for filing with the Boards of Equalization in these two counties.

Letter from Attorneys Dinkelspiel & Dinkelspiel enclosing their memoranda of authorities in opposition to our Order to Show Cause directed against Sheriff Reicks of San Joaquin County.

Re-examined facts in Gildea claim and examined authorities submitted by Dinkelspiel & Dinkelspiel.

Conferred with Mr. Lieurance several times during day. [456]

Sept. 25.

Letter dated September 22nd received from Attorney Stott re Pendleton and Klamath Falls stores and assessments, and petitions for correction of assessments.

Conferred with Mr. Lieurance a number of times during the day.

Sept. 27.

Letter dated September 24th received from Attorney Stott re filing of petitions for correction of assessment at Klamath Falls and Pendleton stores, and re visit of Auditor Phillip A. Hershey.

Letter dated September 25th from Attorney Stott re claim of Stein Bros., asking that we

get in touch with New York Receiver and obtain his views in an effort to present lien foreclosing proceedings.

Letter sent to Mrs. Kathryn Young re mimeographing copies of report which I assisted Mr. Lieurance in preparing.

Letter dated September 22nd from Attorney Harold D. Straus of New York, relative to claim of Philip Jones Corp., asking for information concerning Receivership.

Letter sent to Attorney Harold D. Straus in reply to his of the 22nd.

Conferred with Mr. Lieurance several times during the day and examined further claims of creditors.

Sept. 28.

Sent letter to McManus, Ernst & Ernst relative to letter addressed to Mr. Lieurance under date September 25th, and acknowledged receipt of copies of Order to Show Cause signed by Judge Hand on September 21st, and suggested that under authority of the Courts here in the West, proceedings would be taken to sell all of the stores of the Company; that we would give ample notice of the proposed sales and that Mr. Lieurance is sending full detailed information to everybody interested in the matter of the purchases of the stores.

Received letter from Lowenthal, Collins & Lowenthal stating that they would again take up

with their client the proposition to settle on a basis of 50%. [457]

Sept. 30.

Sent telegram to Attorneys Lowenthal, Collins & Lowenthal of Los Angeles, suggesting that we are sorry their clients refuse proposition; suggesting further that many bids have been received on the stores; that prospective purchasers have been told about the condition of the ownership of the fixtures in which the Weber Showcase & Fixture Company have an interest, and to which they hold title, and that where separate bids were received on fixtures, that they will be submitted to them.

Met several bidders in Mr. Lieurance's office and conferred with Mr. Lieurance during greater part of the day concerning bids and sales.

Oct. 1.

Telegram received from Attorney Victor Ford Collins of Los Angeles, suggesting that his people (referring to Weber Showcase & Fixture Company) cannot afford a loss of 50%; asking for information as to the persons already bidding on the stores; suggesting that they would be willing to take under consideration any bids on their fixtures but that they will not accept anything such as the Receivers have offered.

Conferred with two attorneys representing bidders and conferred with Mr. Lieurance a number of times during the day.

Oct. 2.

Letter prepared and sent to Attorney J. Benjamin Hall of Eugene, Oregon, re claim of Applegate Furniture Company, giving my opinion that claim cannot be allowed as a preferred claim; going into details and giving reasons therefor; and stating that I have to advise Mr. Lieurance, the Receiver, to reject the claim as a preferred one and to allow it as a general claim.

Letter sent to Attorney Plowden Stott acknowledging receipt of his letter of September 24th, and stating that we have advertised stores of Pilcher Company for sale and that the bids already received indicate that we will receive, subject to the approval of the Court, something in excess of $200,000, for what remains of the store stocks; also stating our plan with respect to the obtaining of the approval of the Courts; also mentioning the attempt being made at New York to dispose of all of the stores there by sale in bulk for what the attorneys designate an "upset price." [458]

Letter sent to Attorney Charles A. Hardy of Eugene, Oregon, acknowledging receipt of his letter of September 25th and stating that as soon as we have completed the sales which are now pending, we will take up with the Court the matter of the claim of Stein Bros.

Letter sent to Attorneys Dinkelspiel & Dinkelspiel in reply to theirs of September 24th,

suggesting that I would give my comments within a few days on the authorities presented by them on the Order to Show Cause matter.

Letter sent to Attorney Strauss of New York re claim of Philip Jones Corp.

Went over with Mr. Lieurance the various bids received and consulted and advised with him concerning the bids (fifteen in number) already received.

Had a number of conferences with bidders and their attorneys and with Mr. Lieurance during day.

Oct. 3. (Sunday)

Worked greater part of the day on the preparation of Report and Return of Sales for use in the States of Oregon, Washington and California.

Oct. 4.

Letter dated October 2nd received from Attorney Stott re bill of Journal Publishing Company for publication of notice to bidders published thirteen times from September 17, to September 30, inclusive; also stating that he had not yet received affidavit from publications; also relative to cash advances made by him.

Continued work on preparation of Reports and Returns of Sales.

Oct. 5.

Letter received from Samuel Weinstein, sug-

gesting that it is of great importance that Mr. Pilcher communicate with him at once, and asking me to help him, if possible, to get in touch with Mr. Pilcher. [459]

Letter received from Dinkelspiel & Dinkelspiel, Esqs., in reply to my letter of the 2nd inst., in which I acknowledged receipt of their memoranda of authorities; also remi*n*ing me that the Order to Show Cause will be on the calendar next Monday, October 11th.

Worked on Returns of Sales of California stores and drafts of proposed Order of confirmation and drafts of Bills of Sales.

Had several conferences with Mr. Lieurance during day.

Oct. 6.

Letter sent to Attorney Stott in reply to his of October 2nd, stating that we are preparing Returns of Sales in the various jurisdictions; asking for affidavit of publication of notice from Journal Publishing Company, and stating that I will ask Mr. Hershey, the Auditor, to forward check to him to cover costs advanced.

Letter received from Attorney Joseph Kirk of San Francisco Board of Trade, fixing Friday morning for a meeting of the Committee of creditors and asking that Mr. Lieurance and I be present.

Prepared draft of proposed Order fixing time of hearing in the matter of the application

for confirmation of sales of California stores.

Finished preparation of Report and Returns of Sales of California stores and obtained the signature of Mr. Lieurance thereto.

Had conference with Mr. Lieurance lasting over four hours.

Oct. 7.

Letter sent to Attorneys Dinkelspiel & Dinkelspiel re Order to Show Cause on calendar next Monday, and suggesting that the matter would have to go over two weeks because I would have to be in the U. S. District Court at Portland, on the 11th, Monday next.

Went to San Francisco and filed in the office of the Clerk of the U. S. District Court the Report of the Receivers of the sale of the California stores subject to the confirmation by the Court, and the Receivers' [460] petition for the confirmation of the sales mentioned therein, and presented the Return and petition, together with draft of Order to Show Cause fixing time for the hearing, to Judge St. Sure.

Obtained the Order fixing Monday, October 25th, at ten o'clock A. M., as the time for the hearing of the application for confirmation.

Had several conferences with Mr. Lieurance during day.

Oct. 8.

Letter received dated October 26th from Attorney Stott replying to my letter of the 2nd,

and enclosing affidavit of publication of the Oregon Daily Journal.

Examined affidavit and sent it to Clerk of Court at Portland for filing.

Went to San Francisco and attended meeting at San Francisco Board of Trade in forenoon, and discussed with Mr. Lieurance, Mr. Walton N. Moore and Mr. Kirk, attorney for Board of Trade, the matter of the attempt at New York to sell all of the stores in bulk and to have all of the bids received here considered there instead of in these Western jurisdictions where the stores are located, and where there is likelihood of more competitive bidding. It was generally agreed that it would be to the interests of the creditors to have all bids received here considered by the Courts in these Western jurisdictions where, upon the hearing for confirmation, there is a likelihood of further bids being received in open court. It was also agreed that wires should be sent immediately to New York giving our views. The telegram was prepared in Mr. Kirk's office, each of us making suggestions concerning its form and contents.

Letter dated August 4th received from Attorney Walter E. Ernst of New York, acknowledging my letter of the 28th ult., with enclosures and discussing at length his views concerning sales of stores and urging that no

sales take place except in the New York jurisdiction.

Had long conference with Mr. Lieurance in the afternoon.

Oct. 9.

Letter sent to Attorney Joseph Kirk, of San Francisco Board of Trade, acknowledging receipt of his letter of [461] October 8th and thanking him for enclosures; also sent him copy of telegram and letter this day sent to McManus, Ernst & Ernst at New York.

Sent three-page closely typewritten letter to Attorneys McManus, Ernst & Ernst replying to theirs of October 4th, stating that bids on separate stores and on small groups now aggregate $230,000; that the highest bids will be returned to the Courts for confirmation here and that we have assurance that at the time fixed for the hearings on the applications for confirmation, there will be considerable competitive bidding; suggesting that our plan is to have dates fixed after the time of hearing in New York; and discussing at length the advisability of following our plan; suggesting also that the Receiver, Mr. Lieurance, and I met in San Francisco on October 8th with Mr. Kirk, attorney for Board of Trade, and with Mr. Walton N. Moore, one of the creditors there, and that we were in accord; that our views were that the bids here should be finally con-

sidered in the various jurisdictions where the properties are located; and citing case of Reynolds vs. Stockton, 140 U. S. 254; and also discussing at length the law in the premises.

Letter received from Attorney Kirk enclosing copy of previous letter sent to McManus, Ernst & Ernst, and also the final form of telegram to these attorneys sent by Mr. Moore and Mr. Kirk.

Consulted and advised with Mr. Lieurance during day and left for Portland, Oregon, on evening train.

Oct. 10.

En route to Portland.

Oct. 11.

In Portland.

Went to office of Clerk of U. S. District Court and filed Return of Sale of stores in Oregon, and then went to see Judge Bean and obtained from him Order to Show Cause fixing time for the hearing of the application for confirmation of sales and designating October 27th as the time for such hearing.

Letter received at my office from Attorney Charles A. Hardy of Eugene, Oregon, relative to claim of Stein [462] Bros. and proposed cancellation of lease on Eugene store in the event lien be filed.

Letter sent from my office to Attorney Hardy acknowledging receipt of his letter.

Wire received from my office addressed to me at Portland sending copy of four-page telegram received to-day from McManus, Ernst & Ernst, asking for details of all bids and arguing that sale of stores should be made at New York in bulk and stating that large sum could be obtained there could be realized by sales in the western jurisdictions, and suggesting that at a meeting held next Monday, the New York Creditors' Committee would undoubtedly concur in their views as to this procedure.

Sent telegram from Portland to my Secretary concerning signing of Order fixing time of hearing and stating that Wednesday, October 27, was the time designated, and suggesting certain changes in draft of Order already prepared at my office.

Oct. 12.

Had prepared at my office affidavit of mailing notices to creditors and to all persons interested in the time fixed for the hearing of the application for confirmation of sales.

At Seattle, Washington, Judge Neterer was out of the City and we found that Judge Edward E. Cushman was holding Court at Tacoma, and Mr. Lieurance and I went to Tacoma and presented the Report of Sales to him and obtained from him an Order fixing time for the hearing of the application for confirmation. The time fixed was October 28 at the hour of 8 o'clock P. M. at Seattle. He ordered that

the notices be given by publication in the Daily Journal of Commerce at Seattle, Everett Herald at Everett, and Tacoma Daily Index at Tacoma, and Aberdeen Daily World at Aberdeen, Washington. We returned to Seattle and filed the papers with the Clerk of the U. S. District Court there.

Prepared notices of the time fixed for the hearing; took one copy thereof to the office of the Seattle Daily Journal of Commerce for publication and sent other copies for publication to the various newspapers designated in Judge Cushman's Order. [463]

Oct. 13.

Sent telegram from Seattle to my Secretary, suggesting that as Judge Neterer was out of the City, we obtained from Judge Edward E. Cushman at Tacoma Order to Show Cause, fixing time for hearing and designating kind of notice to be given and suggesting I am mailing copy of Order and that no affidavit of mailing be forwarded by her until I had any opportunity to scrutinize affidavits.

Letter sent from my office to Clerk of U. S. District Court at San Francisco, enclosing Affidavit of Mailing for filing.

Later in day en route to Spokane.

Oct. 14.

At Spokane all day.

Presented to Judge Webster report of sales of stores in Eastern Washington jurisdiction

of Washington, with application for confirmation and obtained Order fixing time for hearing and arranged with Spokane Daily Chronicle for publication of notice of hearing.

Received telegram at Spokane from my Secretary, suggesting wire this day received from Attorneys McManus, Ernst & Ernst of New York, stating prospective bidders in Court at New York but that no bids were received because they could not be assured that any sale made there would give title, and stating that hearing in New York may be considered as closed.

Telegram sent to Daily Journal of Commerce at Seattle, requesting them to mail at once to my office 200 proof slips of copy of Order to Show Cause.

Oct. 15.

At Seattle.

Went to office of Daily Journal of Commerce; called at office of Mr. A. V. Love and conferred with several attorneys representing bidders and prospective bidders.

Left Seattle in evening.

Letter received at my office from Attorney Stott dated October 13, enclosing copy of letter received by him from Attorneys Day, Hampson & Nelson and copy of reply relative to proposed controversy over bids. [464]

Oct. 16.

En route from Seattle to Oakland.

Letter received at my office from J. C. Brill Stores of Portland, dated October 14th re bid on stores and request for assignment of leases on stores at Klamath Falls, Roseburg and Albany, Oregon; stating also that it is not the plan of this Company to operate stores at Portland and Eugene if they are successful bidders; asking also that copies of leases be sent to them.

Oct. 17.

En route from Seattle to Oakland.

Oct. 18.

Back from Seattle.

Letter received from Attorney Plowden Stott dated October 15th re another letter received from Attorneys Day, Hampson & Nelson concerning the bid of two men named Karo & Weiner, and enclosing copy together with copy of reply; all of which I examined.

Letter from Sylverstrype Co. of New York received, asking for information as to dividends and as to the sales of the stores, etc.

Oct. 19.

Letter sent to Clerk of Court at Spokane, enclosing Affidavit of Mailing to be filed.

Received letter from Everett Daily Herald of Everett, Washington, stating that affidavit of publication was ready at that office and stating that charge was $17.28.

Letter sent to Clerk of Court at Seattle, enclosing Affidavit of Mailing to be filed.

Conferred several times during day with Mr. Lieurance.

Oct. 20.

Letter sent to Attorney Stott acknowledging his favor of the 13th and copy of letter from Day, Hampson & [465] Nelson, Esqs.; also stating that I will write directly to these attorneys telling them that I have advised Mr. Lieurance to return to their clients, Karo & Weiner, the amount of their deposit.

Letter sent to Attorney Day, Hampson & Nelson informing them that I have this day advised the Receiver to refund the deposit of Karo & Weiner on account of bid on Pilcher Company store at Klamath Falls.

Letter sent to Attorney Charles A. Hardy in reply to letter of 8th, stating that as soon as we get the sale matters out of the way, we will take up and consider the claim of his client, Stein Bros.

Letter sent to Everett Daily Herald at Everett, Washington, acknowledging information that Notice was received; advising that check would be mailed for $17.28 and requested Affidavit of Publication.

Letter sent to Joseph Kirk, Esq., sending copy of telegram received from Attorneys McManus, Ernst & Ernst concerning the proceedings which took place there on October 14th, and sending him also copy of letter sent to Mr. Lieurance by McManus, Ernst & Ernst

concerning the same; sending also copy of a previous telegram received by me from McManus, Ernst & Ernst concerning the plan in the east to make sale of stores in bulk; stating that in reply to that telegram I sent a long telegraphic letter to them from Seattle giving them explicitly our views; stating also that the highest bids received on the California stores were from A. B. Cohn on the Stockton store, $14,250.; J. F. Holmes, the Turlock store, $14,500.; H. L. Bonderant, the Oroville store, $10,025.07; that these bids had been returned to the Court at San Francisco and that the hearing on the application for confirmation would take place on Monday, October 25th; also stating that our information is that there will be a number of bidders in Court at that time who will very likely raise the present bids.

Conferred with Mr. Lieurance several times during day.

Oct. 21.

Letter received from Attorney Hardy of Eugene, asking for reply to previous letters and expressing concern of his client because of reported sale of Eugene store to Stein Bros.; letter also goes into detail in the matter of the claim of Stein Bros.; it is claimed that they built a large number of tables for the Eugene store, furnishing both materials and labor; commenting also upon the rights

of Mr. Laraway, the Lessor of the building, and threatening to take steps to protect themselves. [466]

Letter dated October 14th received from Walter E. Ernst confirming telegram sent to Mr. Lieurance October 14th, and complaining because no bids were received in Court at New York.

Letter received from Lowenthal, Collins & Lowenthal of Los Angeles, dated October 20th, requesting a full report in regard to the whole situation.

Letter sent to Attorneys Lowenthal, Collins & Lowenthal, giving full information regarding the sales subject to claim of Weber Showcase & Fixture Company, and giving time of hearings and other information which we thought they might desire.

Oct. 22.

Letter received from Attorney W. Coburn Cook of Turlock, California, suggesting that he understands that on Monday, October 25th, the matter of the sale of the stocks of merchandise at Turlock will come on for hearing, and suggesting also that he wants to impress on me that M. M. Berg, the owner of the premises occupied by the Pilcher Store at Turlock, intends to look to Mr. Lieurance for payment of the rent under the lease; that the Receiver, by continuing to pay the rent after his appointment, has bound himself to the

obligations of the lease, and that Mr. Berg does not intend to release the Receiver upon any sale of the store.

Letter received from Attorney Joseph Kirk thanking me for my letter of the 20th, and stating that he has sent a copy thereof to Mr. Walton N. Moore; asking also for copies of telegrams sent by me or Receiver Lieurance from Seattle to McManus, Ernst & Ernst at New York City; stating further that he expects to be in Court on Monday, October 25, on the hearing for the confirmation of sales; and also stating "everything seems to be in excellent shape and I think Mr. Lieurance and yourself should be congratulated on the manner in which the case has been handled to date."

Prepared for use on Monday in U. S. District Court San Francisco, conveyances to be executed in favor of successful bidders.

Examined petition filed by Albert D. Applegate of Oregon.

Examined law concerning necessity for confirming sales reported and concerning rights of bidders appearing in open Court to increase bids. [467]

Conferred with Mr. Lieurance and advised with him several times during day.

Oct. 23.

Letter sent to Judge Cushman at Tacoma, reminding him of hearing on October 28th.

Letter sent to Attorney W. Coburn Cook of Turlock, California, acknowledging receipt of his letter of October 22nd and stating that I should be pleased to take up with him the matter spoken of in that communication shortly after my return from the Northwest.

Prepared draft of proposed Order confirming sales of California stores to be used in U. S. District Court at San Francisco on the 25th.

Prepared Petitions on behalf of Mr. Lieurance to be used in all ancillary jurisdictions, applying for orders of the various Courts permitting the Receivers to send Auditor Phillip A. Hershey to New York for the purpose of checking claims, and bringing back, if possible, either the original books of the corporation or copies thereof.

Prepared drafts of proposed orders to be used in the various jurisdictions, authorizing and permitting the Receivers to send Mr. Hershey to New York.

Oct. 25.

Letter received from Attorney Plowden Stott dated October 22nd, informing me that he has received from the Clerk of Umatilla County a notification that the Board of Equalization considered the petition of the Receivers and had decided that the value placed upon the property of the Pilcher Company by the Assessor was not excessive, and that the assessment should stand.

Letter received from Attorney Stott, dated October 22nd, stating that he had received from Attorney E. C. Heffron of Eugene, Oregon, a copy of petition for an Order requiring receivers to pay to Applegate Furniture Company their claim in full as a preferred claim; also that he had advised Attorney Heffron that he would be glad to later advise him when the matter would be argued; and stating that I would be in Portland on the 27th. [468]

Telegram sent to Aberdeen Daily World, Aberdeen, Washington, asking for Affidavit of Publication of Notice of Sale, and urging that it be sent to me at Hotel Washington, Seattle, immediately.

At San Francisco in U. S. District Court in matter of application of Receivers for an Order confirming sales of California stores to A. B. Cohn, J. F. Holmes and H. L. Bonderant, as they were the highest bidders in open Court to date. The Court confirmed the sales of the three stores to A. L. May for $41,000.

Prepared new Order confirming sale.

Prepared instrument of conveyance to A. L. May and consummated deal at the office of his attorney in First Nat'l Bank Building, San Francisco, and received the balance of the purchase price.

In the event started for Portland.

Oct. 26.

En route to Portland on business of Pilcher Company concerning confirmation of sales.

Oct. 27.

At Portland in the U. S. District Court. Notices were filed and because of lack of time the matter of the confirmation was continued until the following morning.

Conferred with several attorneys during day and took train in evening for Seattle.

Letter sent from my office to me, forwarding Affidavit of Publication of Daily Journal of Commerce at Seattle; and informing me that no taxes were due in California.

Oct. 28.

Continued hearing on petition for confirmation at Portland took place; Plowden Stott, my local counsel, acting for me. The matter was only *partiall* heard and was then continued by Judge Bean until Monday, November 1st.

At Court at Seattle, in matter of confirmation of sales; [469] partial hearing took place at 8 P. M. before Judge Edward E. Cushman and because of contests matter was continued to November 3rd at 2 P. M. when it was stated Judge Neterer would be on hand and would hear the matter.

Oct. 29.

At Seattle, leaving for Spokane.

Oct. 30.

At Spokane.

Attend Court on hearing of application for confirmation of sale. There was a bid higher than the bid of Harrison's Inc. The matter of the right of Harrison's to an order confirming sale was argued and after argument the attorney representing Harrison's Inc. raised the bid to a sum higher than the other bid and the sale of the store upon which the bid of Harrison's Inc. had been made was then confirmed; and the sale of the store at Yakima was confirmed to Phillip A. Ditter.

Received telegram from my office at Oakland, stating that W. H. A. Remmer, attorney for Lessor of Klamath store property, served notice on the 29th to vacate store on the 31st and suggesting that Manager at Klamath Falls had been advised to take no action except to ask the Sheriff to restrain Lessor from interfering with the premises, and advising Manager MacDonald to communicate with me at Portland Hotel, Portland, Oregon.

Oct. 31.

At Portland, Oregon.

Met attorneys and prepared for hearing in Judge Bean's Court following morning. [470]

Nov. 1.

At Portland In U. S. District Court in the matter of contested sales and particularly the contest offered by J. C. Brill stores. There

was considerable argument concerning the law of the case and the right of the J. C. Brill Stores to have their bid confirmed. Higher bids were received, and after considerable discussion the matter was continued until the following morning. In the meantime, meetings were held with certain attorneys representing bidders, and an arrangement was made whereby those desiring to increase their bids might do so at a meeting to be held that evening at the Portland store, at eight o'clock. The highest bidders were Tanhauser Hat Company in the sum of $85,-600. and Lieberman & Rosencrantz for $12,000.

Letter sent from my office to Attorney Charles A. Hardy of Eugene, in reply to his letter of October 29th.

Sent telegram to my Secretary from Portland that I will report all sales directly to Lowenthal, Collins & Lowenthal, attorneys for Weber Showcase & Fixture Company, in reply to their request telegram received asking for full particulars of sales.

Telegram from my Secretary giving me contents of a wire received that day from Attorney Victor Ford Collins.

Prepared final supplemental report of Receivers, showing increased bids.

Assisted in preparation of Answer to petition of Applegate Furniture Company.

Nov. 2.

At Portland.

Attended Court in forenoon and filed Supplemental Report of Receivers and called to Courts attention the highest bids received, and obtained order confirming sales to Tanhauser Hat Co. and to Lieberman & Rosencrantz.

Resisted motion of Attorney Weinstein on behalf of J. C. Brill Stores for an order allowing them the expenses that they had been put to in the matter of pressing bids and appearing in support thereof, which motion was denied.

Prepared Order confirming sales. [471]

Prepared instruments of conveyances conveying stores to successful bidders.

Spent several hours with attorneys representing Tanhauser Hat Company in consummating deal.

Left at night for Seattle.

Nov. 3.

At Seattle in Court on application for confirmation of sales previously reported. Higher bids were received than those reported previously and Judge Neterer confirmed sale of all stores in the Western Washington jurisdiction to J. S. Waugh of Aberdeen, Washington, for the sum of $90,000.

Prepared new orders confirming sale; arranged through Sparkman & McLean Co. for bond

of $80,000. which the Court required of the Receivers in the matter of the sale, which said bond we had approved and filed.

Prepared and delivered instruments of conveyance to J. S. Waugh and his attorney and obtained balance of sale price and consummated deal.

Received copy of Amended Bid of J. S. Waugh.

Also served with and examined copy of objections to confirmation of sale of stores; original objection filed on behalf of Black Mfg. Co. and Johnson & Co. and Western Dry Goods Co. and Miller, Calhoun & Johnson Co., all creditors of R. A. Pilcher Co., Inc.

Also served with and examined petition to reject bids and to accept high bid made by Tanhauser Hat Co. of Portland.

Letter sent from my office to W. J. Brown, attorney at Modesto, California, notifying him of my absence and my attendance upon the Courts in the Northwest in the Pilcher matter; stating that California stores had been sold and the sales confirmed by the Court; also stating that his letter would be called to my attention upon my return to the office.

Nov. 4.

En route from Seattle to Oakland. [472]

Letter received at my office from Attorney Sidney Teiser of Portland, returning copy of letter I had previously loaned him.

Letter dated November 2nd received at my of-

fice from Attorney H. L. Chamberlain of Modesto, suggesting that I obtain and send to Sheriff of Stanislaus County a release of the Humphreys & Matthews attachment (so that the claim of his client could be considered as a first lien) and asking me when the matter of the sale of the Turlock store will come up for confirmation.

Nov. 5.

En route from Seattle to Oakland.

Nov. 6.

En route from Seattle to Oakland.

Letter dated November 3rd received at my office from James L. Baldwin & Co. of Chicago, asking about its claim and suggesting that they would like to have some information concerning the sales of stores and my opinion also as to necessity of filing proof of debt here as well as in New York.

Letter received from Attorney W. Coburn Cook, stating that his client, M. M. Berg, and he will call to see me next Wednesday, November 10th, concerning Mr. Berg's several claims.

Letter dated November 1st received from Sylverstrype Co. requesting information as to status of Receivership and likelihood of dividends, etc.

Letter to Sylverstrype Co. in reply to their letter of the 1st.

Nov. 8.

Letter sent to Attorney W. Coburn Cook of Turlock in reply to his letter of the 5th.

Telegram from Attorney Victor Ford Collins of Los Angeles, stating that he had wired me today but that he had not yet heard anything from me, and asking for status of things in general. [473]

Telegram to Attorney Collins representing Weber Showcase & Fixture Company, stating that I had just returned from the Northwest and that all of the stores had been sold and the sales confirmed subject to any interest of their client; that provisions were incorporated in the instruments of conveyance specially calling attention to the fact that the claim of interest of the Weber Showcase Company in certain fixtures, and stating that I will write him tomorrow and send him copies of Orders confirming sales and copies of Bills of Sale.

Had several conferences with Mr. Lieurance during day.

Nov. 9.

Letter to Lowenthal, Collins & Lowenthal of Los Angeles, confirming wire of yesterday and giving them status of affairs of Pilcher Company, informing them of all sales and enclosing carbon copies of Bills of Sale giving names and addresses of purchasers of various stores, and forwarding copies of Orders confirming sales.

Had long conference with Mr. Lieurance during afternoon.

Nov. 10.

Letter sent to Attorney Charles A. Hardy re Stein Bros. claim, notifying him that the stores sold had brought $257,600. and suggesting that he file his client's claim with the Receiver and that he send to me a certified copy of the Notice of Lien already filed and also suggesting that we will give the matter prompt attention.

Letter sent to Attorney Joseph Kirk, attorney for the San Francisco Board of Trade, stating that we had made a strenuous trip through the Northwest and did not get back until Friday afternoon; that there were quite a few bidders who appeared in open Court and several continuances of hearings; giving him a resume of the sales as confirmed by the Courts, aggregating $257,600.; suggesting also that by selling here in the Western jurisdictions instead at New York, we have probably saved the creditors the sum of $57,-600. (our information from New York had been that by the sale of the stores there in bulk, we could probably get $200,000); that our insistance that the sales be made here was worth while because, as stated, we obtained so much more [474] than could could have been gotten in the East; suggesting that Mr. Lieurance could not tell defi-

nitely how much merchandise was on hand in the various jurisdictions at the time of sale, but that his estimate was about $337,000. on October 20th; suggesting that Mr. Hershey, the Auditor for the Receivers, is leaving for New York tomorrow for the purpose of getting all data with which to check claims; that it is our intention to try to obtain the original books of the Pilcher Company; suggesting the advisability of paying all claims from here and that an application will be made soon for leave to pay a substantial dividend to the creditors; suggesting also that we are doing our best to dispose of our leasehold liabilities.

Long interview at my office with Attorney W. Coburn Cook of Turlock, and his client M. M. Berg, relative to claim of Mr. Berg and threatened action thereon.

Letter to McNoble & Arndt at Stockton, California, replying to their letter of October 28th relative to the so-called "Priority Claim" of Dave Matthews; also reporting sales of stores for $257,600. and stating that as soon as we have checked up all claims, it is proposed to pay a dividend.

Letter sent to Charles Douglas Mack Co. stating that all of the stores had been sold and that the Receivers expect to pay a dividend soon.

Letter to Attorney Joe G. Sweet, replying to his request for information concerning the

sale of stores and enclosing a carbon of letter sent to Attorneys Lowenthal, Collins & Lowenthal of even date, regarding claim of Weber Showcase & Fixture Company.

Nov. 11.

Letter received from Attorneys Lowenthal, Collins & Lowenthal of Los Angeles, acknowledging receipt of telegram and expressing desire for full reports.

Conferred and advised with Mr. Lieurance several times during day.

Nov. 12.

Letter dated November 9th received from Wayne Knitting Mills of Chicago, reminding us that claim of theirs was filed under date September 28th covering amount of [475] their shipments made to Pilcher store at Pendleton, and asking for report and for information as to dividends.

Letter sent in reply to the above, giving full information.

Letter received from Attorneys Hadsell, Sweet & Ingalls dated November 11th, acknowledging receipt of my previous letter enclosing carbon copy of letter to Attorneys Lowenthal, Collins & Lowenthal.

Had long conference with Mr. Lieurance during afternoon.

Nov. 13.

Letter dated November 12th received from Attorney W. Coburn Cook of Turlock, stating

that the rent of the Turlock store for the month of November amounting to $425. is unpaid, and that unless paid before November 28th, Mr. Berg will take possession of the leasehold premises for the account of the Pilcher Company and its Receivers and "will proceed to endeavor to obtain a tenant for the premises in order to mitigate damages."

Letter received from Attorney Kirk replying to my letter of the 10th, concerning assets in stores in California, Oregon and Washington; concerning filing of claims and suggesting that order should be obtained enlarging time of creditors within which to file claims.

Nov. 15.

Letter received from Attorneys Manning & Harvey of Portland, re claim of Kilgreen & Flynn, giving me particulars and stating that the claimants had done work on the Portland store to the extent of $14,880.45 and that they had received only $8778.08, and that they are entitled to a balance of $6102.37; insisting that this claim be considered and paid as a preferred claim and that I, as attorney for the Receivers, should treat it as such.

Letter received from Attorneys Lowenthal, Collins & Lowenthal, dated November 13th, expressing thanks for my letter of November 9th.

Nov. 16.

Conferring with Mr. Lieurance greater part of day. [476]

Nov. 18.

Letter received from Lowenthal, Collins & Lowenthal, concerning matter of its client's claim.

Nov. 19.

Letter received from Attorney Theodore B. Breuner of Aberdeen re claim of C. A. Haynes, L. A. McCullough & Lamb & Horrocks; requesting information concerning distribution of funds on hand.

Letter received from Attorney Charles A. Hardy of Eugene, dated November 17th, enclosing verified claim of Stein Bros. and suggesting that we should allow this claim as a preferred one and that if we did so, they would waive the right of lien covering the property in which the Eugene store is located. The lien is for $4786.65.

Consulted and advised with Mr. Lieurance during day.

Nov. 20.

Letter received from Attorneys Williams & Davis of Everett, Washington, requesting information re discharge of claim of Security National Bank.

Nov. 22.

Letter received from Attorney E. O. Immel of Eugene dated November 20th, relative to the claim of Sigwart Electric Company, insisting that the claim be taken care of as a preferred claim; that the claim is the subject of a lien which has been filed against the property on

which the Eugene store is located and threatening to foreclose the lien.

Letter sent to Attorney Collins stating that we have carefully considered all of the leasehold contracts of the Weber Showcase & Fixture Co. and that Mr. Lieurance would like to confer with somebody in authority with the Company with a view toward adjustment of the claim.

Made another scrutiny of the lease contracts of the Weber Company and the law appertaining to certain provisions thereof, spending the greater part of the day so doing. [477]

Nov. 24.

Assisted in the preparation of letters to be sent to all of the creditors reporting in detail the sale of the stores for $257,600., and stating that the Receiver will now have on hand approximately $417,600; that the total amount of the Pilcher Company indebtedness has not yet been determined; that Mr. Phillip A. Hershey, Auditor for the Western Receiver, is now in New York working with Liedesdorf & Co., the New York Auditors, in an effort to audit the accounts and claims as quickly as possible and stating that as soon as the claims are checked and audited, it is proposed to make a partial distribution among the creditors of a substantial amount.

Letter from the San Francisco Board of Trade, stating that referring to conversation had

with me a few days ago concerning filing of claims, a form of stipulation is enclosed for the signature of Mr. Lieurance and myself, with proposed order of Court.

Letter from McNoble & Arndt of Stockton, making inquiry as to when dividend will be paid.

Nov. 26.

Telegram received from Attorney Plowden Stott, acknowledging receipt of our telegram and suggesting that in response to our request, the Portland Assn. of Credit Men sent a telegram to Judge Hand re proposed bankruptcy.

Had several conferences with Mr. Lieurance during day.

Letter sent to Attorney E. O. Immel of Eugene, Oregon, replying to his letter of the 20th re Sigwart Electric Company, and suggesting that Mr. Hershey, Auditor of Receivers, went to New York for the purpose of getting the original books of the Pilcher Company or a copy thereof, and that on his return we would check up the matter of claims.

Letter sent to McNoble & Arndt in reply to theirs of the 22nd, and giving full information.

Letter received from Attorneys Lowenthal, Collins & Lowenthal, suggesting that they will have a conference with the Weber Showcase people along the lines suggested in the letter received. [478]

Nov. 29. Letter received from Attorney Plowden Stott dated November 26th, stating that the matter of the petition of Albert D. Applegate of Eugene was set for hearing on January 10, 1927, but that it would have to go over until January 17th; asking for data with which to meet the issues; reminding me that he had promised Attorney Heffron that we would have the former Manager of the Pilcher Company store at Eugene present at Portland at the time of the hearing, with all correspondence and order blanks and other data and information; and enclosing copy of the Applegate petition, which I duly examined.

Letter from San Francisco Board of Trade stating that pursuant to telephonic conversation had with me yesterday, a night letter was sent to Judge Hand at New York and sending me a copy thereof.

Several conferences with Mr. Lieurance during day.

Nov. 30.

Received long letter from Attorney Plowden Stott, dated November 27th, re telegram sent by Portland Assn. of Credit Men to Judge Hand, and concerning bankruptcy.

Dec. 1.

Letter from Lowenthal, Collins & Lowenthal requesting outline of our plans respecting adjustment of case.

Dec. 2.

Telegram sent to Attorney Stott asking him to notify Portland Assn. of Credit Men that meeting of Creditors' Committee of Pilcher Company is to be held at New York Friday afternoon for purpose of discussing bankruptcy situation; suggesting that it is probably worth while for Credit Men's Assn. to wire Mr. Fraser, Chairman of New York Committee, protest against bankruptcy and supporting plan of handling and paying claims in equity proceeding; suggested also getting in touch with Attorney W. B. Layton representing the Association and lay the matter before him.

Assisted Mr. Lieurance in preparing telegram to be sent to Mr. A. V. Love of Seattle, suggesting that wire has just been received from Receiver Gotthold stating that [479] Creditors' Committee plans to hold meeting in New York on Friday afternoon relative to proposed bankruptcy proceedings, and suggesting that it might be worth while to wire his opposition to any plan contemplating bankruptcy; that it might also be well to have the Credit Men's Assn wire Chairman Fraser of the Committee; also suggesting that we are informed that Mr. Walton N. Moore can be reached at the Roosevelt Hotel at New York.

Conferred several times with Mr. Lieurance during day.

Dec. 3.

Letter dated December 1st received from Attorney Stott stating that Attorney Harvey, of Manning & Harvey, attorneys for the lien claimant, Kilgreen & Flynn, had notified him that he would file suit to foreclose lien against the property of the Portland store within the next few days.

Letter sent in reply to the foregoing.

Dec. 4.

Letter received from Attorney E. O. Immel of Eugene, Oregon, dated December 2nd, in reply to my note of November 27th, concerning claim of Sigwart Electric Co.; stating that he had filed a merchanic's lien against the property in which the Eugene store is located early in July, and that unless his client's claim be allowed as a preferred claim, he will be forced to bring suit to foreclose.

Letter dated November 30th received from Attorney B. Chandler Snead of New York, representing Diamond Match Company, asking when they may expect a dividend.

Conferred with Mr. Lieurance.

Dec. 6.

Letter dated December 4th received from Attorneys Simon, Gearin, Humphreys & Freed re claim of W. H. Ambler asking for information and prospects of payment. [480]

Scrutinized the so-called "Priority Claim" of Schuler-Ruhl Co. and examined law concerning same.

Examined law relating to procedure in the matter of the payment of proposed dividend and payment to Receivers and their attorneys on account of services rendered, and started preparation of further Report of Receivers.

Dec. 8.

Letter received from Edward B. Lung, Secretary of Wholesalers' Assn of Tacoma, dated December 6th, requesting information concerning various claims filed on behalf of members of this Association.

Letter sent in reply to above.

Spent rest of the day in the matter of the preparation of Report of Receivers and Petition for Order authorizing dividend of 40% and the payment of reasonable sums as allowances on account to the Receivers and their attorney.

Dec. 9.

Met with Attorney Joseph Kirk at San Francisco and had conference with him and Mr. Moore and Mr. Lieurance concerning application of New York attorneys and Receiver Gotthold for allowance to them on account.

Spent rest of day in preparation of further Report of Receivers and papers on proposed application for an Order authorizing payment of dividend of 40% to creditors, and granting reasonable allowances on ac-

count to the Receivers and to Edward R. Eliassen, their attorney.

Dec. 10.

Presented and filed further Report of Receivers and application for an Order permitting the payment of a dividend of 40% to creditors, and granting the Receivers and their attorneys allowances on account. The Order was granted, authorizing such dividend and allowing on account the following payments:

To Arthur F. Gotthold, 25% of $10,000.

To A. F. Lieurance, 75% of $10,000.

To Edward R. Eliassen, $10,000. [481]

Sent telegram to Mrs. Susan R. Murray, Secretary to Judge J. Stanley Webster of Spokane, asking if the Judge would be in Spokane on Tuesday next and if it will be agreeable to him at that time to take up the application for Order authorizing payment of dividend and granting allowance to Receivers and their attorney.

Received telegram from Secretary of Judge Webster stating that he is willing to take up the matter on Tuesday, December 14th.

Spent rest of day working on further Reports and petition for use in the Northwest in the matter of payment of dividend and granting of allowances on account.

Dec. 11.

Letters sent to Attorney Charles A. Hardy, acknowledging receipt of claim of Stein Bros.,

stating that our Auditor is in New York and that on his return we will take up the matter of the adjustment of all claims.

Letter sent to Attorneys Simon, Gearin, Humphreys & Freed of Portland, re claim of W. H. Ambler, stating that the auditor is in New York, etc.

Letter sent to Attorney Stott of Portland, re claim of Albert D. Applegate and noting the fact that hearing in the U. S. District Court at Portland in the matter of this claim was continued until January 17th; stating also that we would like to have Mr. Maloney on hand at the time of trial.

Letter to Attorney E. O. Immel in reply to his of December 2nd, and stating that all of the claims are in New York, having been taken back by Mr. Hershey, the Auditor for the Receivers for the purpose of checking them with the original books of the Company; suggesting also that he had better save his client's rights and take whatever action he sees fit to take in the matter of the mechanic's lien.

Sent telegram to Mrs. Murray, Secretary to Judge Webster of Spokane, thanking her for her wire and stating that we will be in Spokane on Tuesday morning next.

Letter to Wholesaler's Association of Tacoma, stating that the Auditor of the Receivers is in New York for the purpose of checking all claims and that we expect him back with

the books of the Company and all claims within the next ten days; also that it is proposed to pay a dividend to creditors of 40% within a short time. [482]

Letter to Silverstrype Co. of New York informing it of sales of stores and prospects of early dividend.

Letters to Wayne Knitting Mills of Chicago re sale of stores and prospect of payment of early dividend of 40%.

Letter to Attorney B. Chandler Snead of New York, representing Diamond Match Company, replying to his letter of November 30th suggesting that orders are being obtained permitting payment of dividend of 40%.

Started for Portland in the evening.

Dec. 12.

En route to Portland.

Dec. 13.

At Portland.

Went to Court of Judge Bean and found that he was out of the City.

Had long conference with Attorney W. W. Banks of Portland concerning suit of Kilgreen & Flynn and suggesting that this compromise offer which Mr. Banks was authorized to submit to Attorney Manning, representing claimants.

Letter received at my office from Attorney Charles A. Hardy re claim of Stein Bros., asking suggestions as to the course we ex-

pect to follow in the matter of his client's claim.

Letter received at my office from Attorneys Chamberlain, Thomas & Kraemer of Portland, enclosing copy of Complaint served on the 10th on the Wiley Investment Company in the suit of Kilgreen & Flynn; asking what action if any they are to take in the matter because of the fact that we had procured a bond for the Receivers in said matter to protect said Lessors and Pilcher Co.

Left Portland for Spokane, Washington.

Dec. 14.

At Court in Spokane. [483]

Filed further Report and presented the same, together with proof thereon, in open Court to Judge Webster and an Order was granted after a full hearing, permitting payment of 40% dividend to creditors and making allowances on account as follows:

To the Receivers, $5,000.

To their attorney, Edward R. Eliassen, $2,500.

Dec. 15.

At Court in Seattle.

Filed and presented in open Court matter of the further Report of Receivers and their application for an Order permitting payment of dividend of 40% to creditors, and granting allowances on account to the Receivers and their attorney as follows:

To Receiver A. F. Lieurance, $12,000.
To Receiver Arthur F. Gotthold, $1,000.
To Edward R. Eliassen, their attorney, $5,000.

Letter received at Seattle from Attorney Harry F. Rafferty of Portland relative to foreclosure suit of Kilgreen & Flynn.

Telephoned from Seattle to Portland, making appointment with Attorney Rafferty for tomorrow, the 16th.

Received, en route from Seattle to Portland, a telegram from Attorney Joseph Kirk of San Francisco re application for allowances.

Dec. 16.

At Court in Portland.

Filed further Report of Receivers and application for Order authorizing payment of 40% dividend to creditors and the payment of allowances on account to the Receivers and their attorney. Presented matter in open Court before Judge Robert S. Bean and the Court made its Order authorizing such dividend and granting allowances to the Receivers and their attorney as follows:

To Arthur F. Gotthold $1,000.
A. F. Lieurance 13,587.51.
Edward R. Eliassen 10,000.

Called at the office of Attorney Harry L. Rafferty, Title and Trust Building, Portland. Went over file [484] of Globe Indemnity Company and discussed at some length the matter of the Kilgreen & Flynn suit. Then

borrowed file and took same to the Hotel where I carefully examined all papers and documents connected with the case; thereafter went back to Mr. Rafferty's office and returned his file.

Left Portland at night, en route to Oakland.

Dec. 17.

En route from Portland to Oakland.

Dec. 18.

En route from Portland to Oakland.

Letter sent from my office to Attorney Joseph Kirk of San Francisco, stating that I will be back shortly and the matters will then receive attention.

Letter received at my office from Attorney B. Chandler Snead re claim of Diamond Match Company.

Dec. 20.

Received letter dated December 18th from Attorney W. W. Banks of Portland, stating that he had received no definite answer from Attorney Manning respecting the offer of compromise relative to the Kilgreen & Flynn matter.

Went with Mr. Lieurance to office of Attorney Joseph Kirk and met with Mr. Walton N. Moore.

Had long conference with Mr. Lieurance after leaving office of Mr. Kirk.

Dec. 21.

Letter received from Attorney W. W. Banks

of Portland, replying to my local counsel Mr. Stott, stating that service was made on the 17th of certain motion papers in the matter of the claim of W. H. Ambler for $1671.91; enclosing papers and asking for my suggestion in the premises. [485]

Examined motion papers mentioned; looked up law concerning such motion, and sent reply to Attorney Banks.

Conferred with Mr. Lieurance several times during day.

Dec. 24.

Received letter from Attorneys Lowenthal, Collins & Lowenthal, of Los Angeles, stating that in accordance with long distance telephone, they were waiting for letter outlining letter of Mr. Lieurance for adjustment.

Dec. 29.

Telegram received from Attorney Victor Ford Collins stating that he had not heard anything from Mr. Lieurance regarding proposition in the Weber Showcase matter; asking if it would be well to send someone to Oakland to confer.

Dec. 30.

Letter sent to Attorney W. W. Banks re claim of Kilgreen & Flynn and suggesting that we hoped he would be able to come to some understanding with Attorney Manning.

Another letter sent to Attorney Banks re Ambler claim and Motion for order; suggesting

that claim is not proper and that evidently this is the conclusion reached by the New York attorneys.

Letter to Attorney Victor Ford Collins acknowledging receipt of wire and giving general information relative to the situation with respect to claim of Weber Showcase & fixture Company, his client.

Conferred with Lieurance several times during day. [486]

1927.

Jan. 4.

Letter sent to Attorney Thomas G. Greene, Portland, stating that I have examined the claim of the Modish Cloak & Suit Manufacturing Company, and criticizing a portion of the claim suggesting that we try to get together with a view of compromised settlement.

Letter to Attorney Henry Dinkelspiel of San Francisco re claim of Ray A. Gildea asking for further information.

Letter sent to Verne C. McDowell, Albany, Ore. re letter of Mr. Lieurance dated Dec. 29th, 1926 suggesting that if he will prepare form of Transfer we will obtain necessary signatures.

Lengthy conference with Mr. Lieurance.

Jan. 5.

Telegram received from Attorney O. E. Immell of Eugene, Ore. requesting information concerning prospective dividend.

Letter dated Jan. 3rd, 1927 received from Attorney W. W. Banks of Portland, Oregon, re Kilgreene & Flynn suit replying to mine of the 30th ult.; also suggesting that Attorney Manning refused offer of 50% of claim; commenting also upon matters in general.

Jan. 6.

Telegram sent to Attorney O. E. Immell at Eugene, Ore. concerning probable amount of dividends.

Letter dated Jan. 3rd, 1927 received from Attorney W. W. Banks re claim of W. H. Ambler acknowledging my letter with which he returned the Motion papers; suggesting that he had got in touch with Attorney Humphreys, and had obtained consent that the matter may be held in abeyance until return of Mr. Stott.

Letter dated Jan. 5th, 1927 received from Dinkelspiel & Dinkelspiel Esqs. re claim of Ray A. Gildea in reply to my letter of the 4th.

Letter sent to Dinkelspiel & Dinkelspiel in reply.

Letter to Attorney J. C. Bohlinger, of Wenatchee, Wash. re claim of Engst Sign Shop stating that we had [487] treated the claim as a general one as his client appeared to be an independent contractor.

Conferred with Mr. Lieurance several times during the day.

Jan. 7.

Spent the greater part of the day on draft of proposed stipulations concerning allowances made to the Receivers and their attorneys.

Consulted and advised with Mr. Lieurance for over three hours.

Jan. 8.

Lengthy letter dated Jan. 6th, 1927, received from Attorney Thomas G. Greene of Portland, Oregon, in reply to my letter of the 4th relative to the claim of Modish Cloak & Suit Manufacturing Company giving numerous reasons why he thought claim should be allowed as preferred.

Letter sent in reply thereto.

Letter received from John F. Schingler of Los Angeles giving his reasons why his claim should be allowed as a preferred claim.

Worked on draft of proposed stipulations concerning reduction of allowance to Mr. Lieurance and to me.

Examined a number of claims with Mr. Hershey and gave my opinion thereon with instructions.

Letter received from Lowenthal, Collins & Lowenthal, of Los Angeles re. Webber Case & Fixture Co., reporting what they were doing in the matter of adjustments with buyers of the stores; requesting suggestions from us and asking for information concerning the treatment of the claim.

Letter received from Attorneys McNoble & Arndt of Stockton, Cal. relative to reduction of claim of Dave Matthews for $500.00; stating that claim should be paid and that unless payments were made soon suit would be filed.

Consulted with Mr. Lieurance and Mr. Hershey several [488] times during the day.

Jan. 10.

Letter sent to John F. Schingler of Los Angeles acknowledging his favor of Jan. 7th in the matter of his claim.

Letter sent to Attorneys McNoble & Arndt of Stockton re. Matthews vs. R. A. Pilcher Co. insisting that Mr. Matthews was employed by Receivers and inviting discussion of the matter.

Letter dated Jan. 7th, 1927, received addressed to Mr. Lieurance from Bank of Italy, at Stockton, stating in reply to previous letter that it is still holding under attachment $250.00 levied upon in the case of Sherman & Wise.

Letter sent in reply thereto.

Letter received from Attorneys Dinkelspiel & Dinkelspiel of San Francisco re. Gildea claim and its satisfaction.

Letter sent to Attorneys Lowenthal, Collins & Lowenthal of Los Angeles acknowledging receipt of their letter of Jan. 6th; stating that Mr. Lieurance was awaiting for definite information as to the arrangements concerning

the fixtures, and that final disposition could not be made until more was known about the situation.

Worked with Mr. Lieurance on draft of proposed stipulations concerning allowance made to Mr. Lieurance and me.

Jan. 11.

Had three telephonic conversations with Attorney B. D. Townsend of San Francisco.

Consulted and advised with Mr. Lieurance for 2 hours. [489]

Jan. 12.

Letter dated Jan. 27th, 1927, received from The Silverstripe Company of New York commenting upon proposed dividend of 40%.

Letter sent in reply thereto suggesting that Books of the Receivers show payment of this dividend.

Letter received from Attorney Francis J. Heney dated Jan. 27th, 1927, asking if Mr. Lieurance would give an answer relative to stipulation.

Went to San Francisco and had an interview with Mr. Francis J. Heney at his office.

Letter received from Attorneys, McNoble & Arndt, re. the statement that David Matthews had been employed by Receiver and that his employment continued until Receiver Lieurance discharged him in December; stating that complaint has been prepared and would be filed in the Supreme Court of San Joa-

quin County of settlement was not obtained shortly.

Conferred with Mr. Lieurance and spent the entire day in the business of the Receivership.

Jan. 13.

Letter sent to Clerk of the United States District Court of Portland enclosing for filing in his office an Affidavit of Mailing Notices.

Letter received from Globe Indemnity Company re. premiums on bonds.

Letter received from Attorneys, McNoble & Arndt, relative to reduction of the claim of Eastman-Gibbons Company for bags and claiming non-responsibility of Humphreys and Matthews for the ordering thereof.

Had long conference with Mr. Hershey relative to claims which I inspected and passed.

Jan. 15.

Letter sent to Attorney Plowden Stott in reply to wire of yesterday concerning continuance of hearing in the Applegate matter stating also that we have allowed as a preferred claim the claim of Modish Cloak & Suit Manufacturing Company for $878.45, [490] and that Attorney Thomas G. Greene representing claimant has spent the sum of $32.25. Suit was brought upon this claim and attachment levied upon the Portland store prior to the appointment of the Receivers. A Surety Company bond was obtained for the release

of the attachment before the Receivership and it was suggested that in the affidavit the claim was allowed as a general claim. We would have to pay nevertheless any deficiency on the claim to the Surety Company which furnished the bond.

Letter to F. O. Nebeker notifying him that Judge A. F. St. Sure had appointed him Special Master in the Pilcher matter for the purpose of hearing the testimony on disputed claims and getting advices thereon; suggesting that there are a number of claims that will need adjustment by him, and that these matters will be referred to him shortly.

Letter sent to Attorneys McNoble & Arndt of Stockton re. claims of Eastman-Gibbons Co. and David Matthews suggesting that these claims should be referred to the Special Master, F. O. Nebeker, and giving them my opinion concerning the appointment of the Special Master.

Letter to John F. Schingler of Los Angeles stating that his claim should be passed upon by the Special Master.

Letter to Sheriff Wm. H. Reicks of Stockton asking for time of release of Gildea attachment and for settlement of any funds still in his possession.

Letter sent to Attorney Thomas G. Greene, Portland, Ore. stating that auditors had issued cheque payable to his client and that

the same was sent to attorney Plowden Stott with proper instructions.

Examined a great number of claims of creditors; conferred with Auditor Hershey relative thereto.

Had several conferences during the day with Mr. Lieurance.

Jan. 17.

Letter dated Jan. 15th, 1927, received from Attorney O. E. Immell of Eugene, Ore. re. claim of Sigwart Electric Co. giving his reasons why claims should be allowed in full as a preferred claim. [491]

Conversed with Attorney Francis J. Heney over the telephone.

Examined further claims of creditors, and conferred with Mr. Hershey, the auditor.

Had long conference with Mr. Lieurance.

Went to San Francisco and called at the office of Attorney, Francis J. Heney, and had a conference.

Had a long conference with Mr. Lieurance concerning various matters connected with the administration.

Jan. 19.

Letter from Attorney Plowden Stott of Portland dated Jan. 17th, 1927 relative to claim of Applegate stating that as Judge Bean was not sitting he had agreed with Attorney Heffron to a postponement of the hearing until February 7th; also confirming wire

sent last Friday and suggesting that he will get Attorney Heffron to specify definitely what letters and wires he wants us to produce in Court at the hearing.

Letter from Attorneys McNoble & Arndt dated Jan. 18th, 1927 giving it as their opinion that it would not be necessary to have the Eastman-Gibbons case heard before the Master as the facts could not be said to be in dispute; also threatening that suit would be filed in the Dave Matthews matter.

Went to San Francisco and again called at the office of Francis J. Heney.

Spent the entire day in the business of the administration.

Jan. 20.

Letter dated Jan. 17th, 1927, received from Attorney Plowden Stott re. Kilgreene & Flynn suit stating that he will make another effort through Attorney Manning to effect a compromise.

Letter dated Jan. 17th, 1927, received from Attorney Plowden Stott re. Ambler case sending me all papers in the matter of the Motion including Affidavit of Mr. Ambler; suggesting that I prepare suitable [492] Answer and return with all information available.

Letter dated Jan. 18th received from Robert F. Maguire, Master in Chancery, in Portland, Oregon, notifying me of his appointment as

Special Master in the Pilcher matter, and stating that he now has before him the matter of the claim of J. C. Brill Stores, and suggesting that he give a date for the hearing.

Sent reply thereto.

Letter received from Attorney Plowden Stott stating he had certain wires forwarded East protesting against Bankruptcy.

Examined all Motion papers in the matter of the audit of Show case proceeding instituted by W. H. Ambler of Portland. Re-examined the letter pertaining thereto; prepared Answer for Receiver Lieurance and returned all papers to Mr. Stott with instructions.

Worked on draft of proposed stipulations concerning allowances.

Had several conferences during the day with Mr. Lieurance.

Jan 21.

Consulted and advised with Mr. Lieurance for over 4 hours.

Worked on stipulation concerning allowances.

Jan. 22.

Spent all day in San Francisco, consulting with Attorney Francis J. Heney; examining the files in the Pilcher case in the office of the United States District Court, and consulted and advised with Mr. Lieurance.

Jan. 24.

Examined letter addressed to Mr. Lieurance

under date of Jan. 20th, by Roberts, Johnson & Rand of St. Louis re. compensation of Receivers and Attorneys. [493]

Consulted and advised with Mr. Lieurance concerning claims.

Examined a number of creditors claims and advised thereon.

Jan. 27.

Letter dated Jan. 25th received from Attorney Plowden Stott of Portland re Ambler claim enclosing copy of letter received from Attorneys Simon, Gearin, Humphreys & Freed, and requesting suggestions from me.

Letter in reply thereto sent to the Attorneys for Mr. Ambler.

Letter received from Attorney Plowden Stott dated Jan. 25th, relative to allowances on account of Attorneys fees.

Jan. 28.

Letter dated Jan. 25th received from Attorney Plowden Stott re. Modish Cloak & Suit Manufacturing Co. in reply to my letter of the 15th, stating that he has taken up the matter of the dismissal of the action with Attorney Thomas G. Greene; has obtained a stipulation of dismissal in the Circuit Court; obtained an order thereon; a certified copy which was delivered to the Royal Indemnity Co. that furnished the bond on attachment; also a receipt in full from claimant; also re-

turning all correspondence and files in the case.

Interview with Mr. Rosencrantz.

Several conferences with Mr. Lieurance during the day.

Jan. 29.

Letter dated Jan. 26th received from Attorney Plowden Stott re. Kilgreene & Flynn suit stating that time had been extended to February 24th; that he had a further conference with Attorney Manning representing the plaintiff; discussed matters generally, and asked about dates of probable final dividend. [494]

Jan. 31.

Letter dated Jan. 28th, received from Attorney Plowden Stott re Applegate claim enclosing copy of letter received from Attorney Heffron; suggesting that we have Mr. Maloney, the former store manager of the Eugene Store, in Mr. Stott's office before Feb. 7th, the day of the hearing.

Examined letter from Attorney Heffron mentioned above.

Had conference with Mr. Lieurance.

Passed upon several creditors claims.

Feb. 1, 1927.

Went with Mr. Lieurance to the office of Attorney Francis J. Heney, in San Francisco by appointment and agreed upon forms of stipulations of amounts in the matter of their

agreement to a reduction in the amounts of allowances on account of services rendered, and Mr. Lieurance and I, and Mr. Heney and Mr. Townsend signed stipulations in triplicate for each Western Jurisdiction. Stipulations were then sent to the office of Mr. Joseph Kirk, and I waited for return thereof, but at 4:30 o'clock I was told that there was a little unaccountable delay but that the stipulations would be mailed and reach me tomorrow without fail. Spent entire day in this matter at San Francisco.

Feb. 2.

Letter sent to Special Master, F. O. Nebeker giving him information concerning the Pilcher proceeding; stating that a number of claims had been filed with the Receivers here which will need his attention; sending him a copy of the Order of Appointment; reminding him of the fact that the matter of the Schingler claim will come before him on Friday, Feb. 4th. at 10:00 o'clock for hearing.

Letter dated Feb. 1st. received from Attorney W. Coburn Cook at Turlock stating that he is bringing an action on behalf of M. M. Berg against the Receivers covering a number of items; asking if I will accept service on behalf of defendants, and making a number of requests concerning the proposed action. [495]

Letter sent to Attorney W. Coburn Cook of

Turlock referring to his of the 1st, and suggesting to him that the action cannot be brought by him in the State Courts; calling his attention to the fact that a Special Master had been appointed for the purpose of Hearings on disputed claims, and suggesting that we agree upon a time for hearing.

Went to the office of Special Master, F. O. Nebeker, and had a conference with him concerning proposed procedure in the matter of the hearings on disputed claims.

Had lengthy conference with Mr. Lieurance and with Phillip A. Hershey, the auditor.

Feb. 3.

Letter dated Feb. 2nd, received from Attorney H. L. Chamberlain of Modesto re. Haymon-Krupp (Grace Cutting) vs. Pilcher Co. referring to our telephonic conversation of last Monday; discussing his case at length giving his authorities; suggesting Motion of Injunction so as to allow him to go forward with his suit, and suggesting his objections to our demand to have the sum of $2,674.09 in this case of attachment delivered to the Receivers.

Conferred at some length with the auditor, Phillip A. Hershey.

Attended the hearing before Special Master, F. O. Nebeker in the matter of the disputed claim of John F. Schingler; spent the entire morning in the taking of the testimony and in discussion, and at the conclusion we se-

cured the consent of Mr. Schingler to allowance of his claim as a general claim (he had insisted heretofore upon being given a preference).

Feb. 5.

Telegram received from Attorney Plowden Stott re. letters and telegrams to be used in the matter of the hearing of Ambler vs. R. A. Pilcher Co. [496]

Feb. 7.

Telegram sent to Attorney Plowden Stott telling him that my entire Applegate file was left with him, and that Mr. Maloney, former store manager, has all the details concerning the transactions with Mr. Applegate, and that he can furnish them when needed.

Letter sent to Attorney Stanley M. Arndt of Stockton, Cal. re. claim of Eastman-Gibbons Co. suggesting that someone representing this Company had seen me this morning and had expressed a desire to have the matter heard this week before the Special Master; Thursday was the time fixed subject to his approval.

Called at the office of the Special Master and arranged for hearing of the Eastman-Gibbons claim on February 10th.

Conferred with Mr. Lieurance for several hours.

Feb. 8.

Went to San Francisco to the office of Mr.

Heney, spent a half a day making the trip.

Feb. 10.

Letter dated February 8th received from Attorneys McNoble & Arndt of Stockton, Cal. re. claim of Eastman-Gibbons Co. notifying me of absence of Attorney Arndt and requesting that I have this matter put over for at least 2 weeks.

Had interview with Mr. J. L. Taylor of Stockton who is the Secretary of Eastman-Gibbons Co. He said that McNoble & Arndt would not represent his Company or him in any way. I telephoned to Stockton and it was admitted that there was no employment, but was suggested that it would be all right to discuss matters with Mr. Taylor.

Received letter from Eastman-Gibbons Co. of Stockton stating that notice has just been received to the effect that Judge Nebeker had set Thursday, Feb. 10th, for the hearing of its claims; suggesting that the matter be continued to the 15th, and also that attorneys McNoble & Arndt would not represent them.

[497]

Letter sent to Eastman-Gibbons Co. replying to letter of the 9th stating at their request we have had the matter continued to Tuesday, Feb. 15th, 1927, at request of Mr. Taylor, Secretary of the claimant.

Letter sent to Zillabach Paper Co. stating that at request of Mr. Taylor of the Eastman-

Gibbons Co. we have had the hearing on the claim set over to February 15th, 1927.

Letter received from Attorney Francis J. Heney referring to our conversation over the telephone and suggesting in a 2½ page letter a number of changes in the form of stipulation.

Letter received from Attorney Plowden Stott stating that he spent some time with Mr. Maloney going over the facts of the Applegate claim matter; discussing the Alder Investment Company lease matter, etc.

Feb. 11.

Sent a 4½ page closely written letter to Attorney Francis J. Heney and B. D. Townsend in reply to theirs of February 10th discussing the stipulations. Mr. Lieurance and I had already signed upon the representation that they were agreeable in substance and form to Mr. Walton N. Moore and Attorney Joseph Kirk, and commenting at length on the refusal of Mr. Moore to sign in view of the statement made to me that Mr. Moore and Mr. Kirk had seen the form of stipulation and agreed to sign it, and that it had the approval of the New York Committee, and particularly in view of the fact that he had sent under his own signature a telegram to Mr. Fraser, chairman of the New York Committee of Creditors "and recommending that the New York Committee approve the arrangement" and stating among other things

"Specifications further provide that $15,-000.00 allowed to Lieurance and Eliassen respectively shall be considered minimum agreed payments on account, and shall not be further reduced," and also "that although further proceedings are taken in Bankruptcy matter exclusive right to fix Lieurance's compensation and Eliassen's fee shall rest with Receivership Courts;" discussing Mr. Moore's suggested changes and giving our views.

Conferred at considerable length with Mr. Lieurance spending the entire day in this matter. [498]

Feb. 12.

Letter dated Feb. 10th, received from Attorney W. Coburn Cook of Turlock, California, replying to mine concerning the Hearing before Special Master of the matter of the various claims of M. M. Berg and suggesting that he would like to have me obtain several dates from which to choose.

Letter dated Feb. 10th, received from Attorney Plowden Sott re Ambler claim referring to me a letter written by Lester W. Humphreys re. hearing in the matter of their claim.

Feb. 14.

Letter sent to Attorney Stanley M. Arndt, at Stockton, representing Dave Matthews, stating that Special Master had fixed the time for hearing in the matter of this claim, and

that the hearing would take place on Monday, February 21st, 1927.

Letter dated Feb. 10th, 1927 received from Attorney Plowden Stott re. Applegate claim stating that Judge Bean indicated to the Attorney for Applegate that his claim should not be allowed as preferred; that the matter was referred to a referee for the taking of testimony; that he had appointed Mrs. Bell, Court Reporter, for that purpose, and that the testimony of their witness, Mr. Maloney, was taken on the 7th; that the testimony on behalf of your client would be taken at Eugene, Oregon, on February 14th.

Letter dated February 11th, 1927, received from Kilgreene & Flynn of Portland stating that they have been expecting dividend and asking when it will be paid.

Attorney Plowden Stott attended a hearing before O. E. Immell at Eugene, Ore., in the matter of the disputed claim of Applegate, and agreed with attorney and claimant to submit the matter on briefs.

Letter sent to Attorneys Lowenthal, Collins & Lowenthal, Los Angeles, announcing the appointment of F. O. Nebeker as Special Master, and that the matter of the disputed claim of the Webber Show Case & Fixture Company would be taken up before the Special Master on Thursday, February 4th, 1927; suggesting also that if the time does not meet with their approval I should be pleased

to have them let me know so that I can arrange for another date.

Letter sent to Attorney John R. Cronin, at Stockton, [499] California, re. claim of Sherman & Wise announcing the appointment of F. O. Nebeker as Special Master and that an appointment had been made for the hearing of the contested claim on Wednesday, February 23rd, 1927; suggesting also that I hear from *from* as to whether or not the time is agreeable.

Letter sent to Attorney W. Coburn Cook of Turlock, California, notifying him of the appointment of a Special Master, and suggesting that I had arranged to have a hearing on the disputed claims of M. M. Berg, his client, on Friday, February 18th, 1927.

Memorandum letter sent to Mr. Lieurance giving him the dates of hearings before Special Master on the disputed claims of M. M. Berk, David Matthews, Sherman & Wise, and Webber Show Case & Fixture Company.

Attended the Court of the Special Master, Frank O. Nebeker, and spent a half a day in the matter of the taking of testimony.

Had long conversation with Mr. Lieurance and Mr. Hershey, the auditor, relative to claims.

Feb. 15.

Letter sent to Attorney Plowden Stott re. request made on Mr. Layton to cause wire to be sent to New York on behalf of Oregon creditors protesting against Bankruptcy mat-

ter, and suggesting that I did not believe New York Committee is disposed to force the matter to adjudication.

Letter to Plowden Stott in reply to his of January 25th, suggesting that I went to Portland in December and that an Order was made authorizing a 40% dividend to creditors, and allowing the $10,000.00 on account of attorneys fees; touching upon the general situation concerning fees and allowances and the matter of his compensation.

Letter sent to Attorney Stanley M. Arndt stating that Mr. Lieurance has not been served with a Summons in the Supreme Court action brought against him in San Joaquin County; that so far as a continuance of the hearing on the Matthews claim before him is concerned [500] Mr. Nebeker feels he cannot comply with the request to continue the matter three weeks, and that he has put the matter down to be heard on February 28th, and that the Master prefers to have all witnesses appear before him in person.

Attended Special Master's Court and participated in the proceedings in the matter of the disputed claim of Eastman-Gibbons Company.

Letter sent to Attorney Plowden Stott making several suggestions concerning attempted settlement with Kilgreene & Flynn.

Long conference with Mr. Lieurance.

Feb. 16.

Telegram sent to Attorney Plowden Stott stating that Mr. Flynn of Kilgreene & Flynn is here in Oakland today, and has agreed with Mr. Lieurance to have the claim of his firm considered as a general one; that Mr. Flynn has wired his attorney "will dismiss the suit in Portland"; suggesting he get in touch with Mr. Manning, the Attorney, and get stipulation and satisfaction of all claims against Lessors and sub-lessors and Discharge of Lien, and release of Bond furnished on behalf of Receivers, and when this has been done to wire me so that Mr. Lieurance can hand Mr. Flynn a cheque to cover 40% of claim representing first dividend.

Letter sent to Attorney Plowden Stott re. Ambler claim.

Had long telephonic conversation with Los Angeles Attorney, Collins, speaking on behalf of the Webber Show Case Company.

Feb. 17.

Telegram received at my office from Attorney Plowden Stott re. night letter of yesterday. [501]

Letter to Attorney Plowden Stott concerning hearing in Applegate matter stating that the matter should be heard before the Special Master at Portland instead of before a Referee at Eugene; suggesting that Kilgreene & Flynn matter is now out of the way; call-

ing his attention to the fact that the claims of the J. C. Brill Stores, W. F. Ambler, Sigwart Electric Company and Stein Bros., aggregating $8,156.79, are still to be disposed of; stating that I will write to Attorney E. O. Immel to get in touch with Mr. Stott concerning the matter of the hearing before Robert F. Maguire, Special Master; discussing procedure; giving the names and addresses of the attorneys for the clients, and suggesting that we desire to close the administration as soon as possible.

Telegram to Attorney Plowden Stott stating Receiver has sent a check for $150. payable to Milarky, Seabrook & Dibble, attorneys for one of the defendants; suggesting that Flynn would like to get his check today but that it will be held until we receive his further wire.

Telegram received from Attorney Victor Ford Collins re his client's claim.

Feb. 18.

Letter sent to Sheriff Reicks of Stockton, forwarding him for service on Dave Matthews a copy of Order made by the United States District Court at San Francisco on June 9, 1926, and also another order of the same Court dated August 9, 1926, requesting that service be made as soon as possible.

Letter sent to Attorney Stanley M. Arndt rejecting offer of compromise of claim of Dave Matthews; declining to agree to take deposition of his client and witnesses at

Stockton; giving reasons therefor; and discussing various phases of the case.

Letter dated February 15th from Attorney Plowden Stott re Applegate claim, stating that he went to Eugene on Sunday and appeared yesterday before E. O. Immel, U. S. Commissioner at Eugene, and participated in the taking of testimony, and stating further that the attorneys have agreed to submit the matter to Judge Bean on briefs.

Letter received from Attorneys McNoble & Arndt dated February 17th; stating that letter is written without prejudice to the right claimed to objection to the jurisdiction of the Special Master; also in the *matter* [502] *the* claim of Eastman-Gibbons that basis of settlement be offered; also stating that complaint of the suit instituted in San Joaquin County against the Receivers had been returned.

Attended trial before the Special Master in the matter of the various claims of M. M. Berg.

Consulted and advised with Mr. Lieurance several times during the day.

Feb. 19.

Letter dated Feb. 17th received from Attorney Plowden Stott re Kilgreene & Flynn, stating that in reply to my telegram of the 16th he got in touch with Attorney Manning, representing the claimant, and with the Attorneys for the Bonding Company and arranged that

they have dismissal of suit; that Chamberlain, Thomas, Kraemer & Powell, Attorneys for one of the defendants agree that the $100.00 already paid them would be accepted in full for their services, and that Milarkey, Seabrook and Dibble demand a fee of $150.00; reiterating a fact that the Bond furnished agreed to save the obligatees harmless from all demands including attorneys fees; that since then he had received a wire from me that check for this latter amount was on its way; suggesting that he was getting stipulations; that he would furnish me with copies of Order of Dismissal and return the bonds.

Letter from Attorney Plowden Stott re sublease of the Alder Investment Company stating that Wm. P. Merry Co. was consulted concerning same but that after investigating the lease said he could be of no service; was going into the various aspects of the case, the said letter covering 3 pages of closely typewritten matter.

Feb. 21.

Letter to Attorney B. D. Townsend acknowledging receipt of his favor of Feb. 19th.

Letter to Attorney Plowden Stott re Ambler matter and the procedure to be followed; commenting upon allowances and the possibilities connected with Bankruptcy, and stating that we are hurrying on to a close of the administration. [503]

Feb. 21.

Letter to Stanley M. Arndt in reply to his letter of the 19th re claim of Dave Matthews, his client, stating that the Master feels that claimant and his witnesses should appear before him; that I prefer to examine them here; calling his attention to the law covering the taking of depositions; criticizing his view of the law and calling his attention to Section 1224 of the code; and discussing the matter of the service of Restraining Order upon Dave Matthews.

Letter sent to Attorney Plowden Stott acknowledging his letter of Feb. 17th, with enclosures in the Kilgreene & Flynn matter.

Letter received from Plowden Stott in reply to my letter of the 17th enclosing check for $150.00 payable to Milarkey, Seabrook & Dibble; also re Order appointing Robert F. Maguire Special Master; also concerning various claims.

Letter received from Attorney B. D. Townsend stating that he had found Mr. Moore very uncompromising as to his position, etc., relative to form of stipulation agreed upon between the attorneys.

Received and examined copy of letter from Attorney Joseph Kirk, to Mr. Heney explaining attitude of Mr. Moore.

Letter from Plowden Stott replying to night-letter of the 15th concerning Appointment of Special Master.

Discussing the matter of the sub-lease of the Alder Investment Company and certain claims; and also compensation.

Letter received from Attorneys McNoble & Arndt of Stockton, dated Feb. 19th stating that Mr. Arndt did not wish to bring his witnesses to Oakland, etc.

Letter received from A. G. Tschierschky, Deputy Sheriff of San Joaquin County, stating that Orders in Ancillary proceedings heretofore sent to Sheriff for service upon Dave Matthews had been duly served, and asked that an Affidavit of Service be prepared and sent to him for his signature.

Attended the Court of Special Master, F. O. Nebeker, in [504] the matter of the continued hearing on the various claims of M. M. Berg.

Consulted and advised with Mr. Lieurance and with Mr. Hershey, the auditor.

Feb. 23.

Telegram received from Plowden Stott re. four disputed claims to be heard before the Special Master at Portland, Oregon.

Telegram to Attorney Plowden Stott stating that files in contested cases were sent him last week.

Letter to Attorney W. Coburn Cook, representing M. M. Berg, suggesting that Special Master stated this morning that he felt he should have the testimony of Mr. Swanson, former

store manager of the Stockton store, and directing us to have him appear on Friday the 25th for examination; suggested also that the Judge had written to him (Mr. Cook).

Conferred with Mr. Lieurance.

Feb. 24.

Received long letter from Attorney B. D. Townsend relative to stipulation stating that he had been advised by Mr. Kirk that form has met with the approval of Mr. Walton N. Moore.

Feb. 25.

Telegram received from Attorney Stott acknowledging receipt of files in disputed claim matters suggesting that hearings would be arranged for at early dates; also outlining procedure concerning sub-lease and its assignment.

Telegram sent to Attorney Plowden Stott re files suggesting that on day of confirmation of sale of stores Judge Bean heard request on behalf of Brill Stores for amount of claim now in litigation and granted it; suggesting further that they start [505] publication of Notice of Sale of interest in Portland lease giving time allowed by law, and fix his office as place of sale; and asking for his views.

Letter sent to Sheriff, Wm. H. Reicks, San Joaquin County, enclosing for his signature

Affidavit of Service with the request that he return it to me when executed.

Prepared and drafted Affidavit of Service of Orders for signature of Sheriff Reicks.

Letter dated Feb. 23rd. received from Attorney Plowden Stott re Kilgreen & Flynn enclosing copy of letter from Attorney Harry L. Rafferty, representing the Globe Indemnity Company, advising us that the liability under the Bond is at an end; suggesting also that three or four attorneys representing claimants whose claims are disputed have agreed upon dates for hearings before Special Master.

Attended Court of Special Master F. O. Nebeker, and participated in further hearing in the matter of the disputed claims of M. M. Berg.

Consulted and advised with Mr. Lieurance.

Feb. 26.

Letter sent to Globe Indemnity Company at Oakland re bonds furnished against Mechanics Lien suit in Portland instituted by Kilgreene & Flynn; notifying the Company that we had settled the case and that the suit has been dismissed with prejudice; stating that Attorney, Harry L. Rafferty, representing the Portland office of the Company, has written to the San Francisco office under date of Feb. 21st to the effect that suit has been dismissed and that liability of the Company is at an

end, and suggested that any collateral obtained before the issuance of Bond be returned. I also suggested that they send me a letter stating that the Bond had been returned and that the matter is closed

Telegram sent to Attorney Plowden Stott acknowledging wire of the 25th, and suggesting that we realize that only sub-lease can be given because of provisions in Alder Investment Co. sub-lease, and stating that I believe it would be well to publish notice for 10 days unless the Oregon law prescribes differently; suggesting [506] further procedure and asking that Notice be started Monday.

Letter sent to Attorney Plowden Stott acknowledging his letter of the 23rd with enclosures relating to the matter of Kilgreene & Flynn.

Feb. 28.

Letter received from Attorney H. L. Chamberlain of Modesto re Haymon-Krupp Co. vs. Pilcher Co. suggesting that check to cover 40% dividend was received some time ago.

Examined letter of Feb. 25th received by Mr. Lieurance from McManus, Ernst & Ernst re adjudication by default in Bankruptcy matter.

Consulted and advised with Mr. Lieurance for several hours.

Letter received from Attorney Francis J. Heney.

Long distance telephone conversation with Attorney Chamberlain.

March 1.

Letter from Globe Indemnity Co. in reply to my letter of Feb. 26th stating that my letter was forwarded to San Francisco office and that the matter of the cancellation of Bonds will be handled from that office.

Prepared notice of proposed sale of sub-lease of Alder Investment Co.

Consulted with Mr. Lieurance and Mr. Hershey relative to the Haymon-Krupp claim.

March 3.

Letter received from Attorney Plowden Stott dated March 1st acknowledging receipt of my letter of Feb. 17th, and referring to claims of J. C. Brill Stores, W. H. Ambler, Sigwart Electric Co., Stein Bros. and the Albany Democrat Herald (Attorneys [507] Hill & Marks representing the newspaper); suggesting that in accordance with my request the matters in dispute would be taken before the Special Master appointed for the purpose, and that the matter of the Brill Stores claim had been set down for hearing on March 3rd; also suggesting that he had consulted with other attorneys as to times when they would be willing to have their matters heard; also going into detail concerning these various claims.

Telegram received from Attorney Plowden Stott asking if I desire stenographic notes taken of proceedings in hearings on disputed claims.

Telegram from Attorney Plowden Stott stating that hearing today on Brill Stores claim very satisfactory; that Ambler hearing would take place tomorrow; and asking reply to certain questions concerning Ambler claim.

Letter received from Attorney Stott dated March 1st, replying to my telegram concerning sale of sub-lease.

Attended Court of Special Master, Nebeker, on further hearing relative to disputed claims of M. M. Berg; spent all afternoon on this matter.

March 4.

Telegram sent to Attorney Plowden Stott suggesting that in the matter of the Ambler claim it would be well to have claimant establish every item and to concede nothing.

Hearing on Brill Company claim attended by my local counsel, Plowden Stott, at Portland, before Robert F. Maguire, Special Master at Portland.

Attended Court of Special Master F. O. Nebeker in the Matter of the disputed claim of the Weber Showcase & Fixture Co. aggregating $33,743.21. Spent greater part of day in this matter.

March 5.

Attended Court of Special Master, F. O. Nebeker, re [508] disputed claim of David Matthews.

March 7.

Letter dated March 4th received from Plowden Stott stating that he had spent entire afternoon before Special Master, Maguire, at Portland, in hearing on Brill stores Claim (Samuel B. Weinstein appeared for the claimant); suggesting also that Mr. Weinstein appeared anxious to compromise.

Letter to Attorney Plowden Stott replying to his letter of March 4th.

Conferred with Mr. Lieurance and Mr. Hershey several times during the day.

March 8.

Telegram sent to Attorney Stott in reply to his wire suggesting the taking of testimony in writing.

Letter sent to Attorney Stanley M. Arndt of Stockton in reply to his of March 7th; commenting upon form of stipulation proposed, and stating that I have signed it and will return same to him today.

Letter received from McManus, Ernst & Ernst, replying to my telegram to them of March 3rd in relation to the entry of Order of Adjudication in the Bankruptcy proceedings; giving reasons for adjudication, and stating that its effect will not prejudice our rights in the Equity Courts.

Letter received from Attorneys McManus, Ernst & Ernst stating that Mr. Hershey was in error when he stated that no claim had been received on behalf of Dave Matthews; enclosing draft of proposed stipulation setting forth various correspondence between his office and mine, and requesting my signature thereto.

Examined carefully draft of proposed stipulation and signed same after making certain charges; said stipulation to be used by the Special Master in consideration of the disputed claim of Dave Matthews. [509]

Conference with Mr. Lieurance lasting 2 hours.

March 9.

Long interview with Mr. Hershey, the auditor.

Spent some time in drafting reply to Attorney Francis J. Heney.

Consulted with Mr. Lieurance.

March 10.

Letter received from Attorneys, McNoble & Arndt giving data required in hearing as to the employment of Dave Matthews by Pilcher, and enclosing a statement of the evidence adduced before the Special Master as he recalled it.

March 11.

Lengthy letter sent to Attorney Plowden Stott re Ambler matter and the procedure therein; re compensation; re. news just received from Attorneys McManus, Ernst & Ernst concern-

ing Bankruptcy at New York and concerning wire I sent, and the reply thereto, and setting out copy of letter received from New York attorneys suggesting among other things that the Bankruptcy matter cannot in any way work to our prejudice.

Letter sent to Attorney Francis J. Heney in reply to his letter of the 10th suggesting that I will go over the subject of his letter and will let him hear from me later.

Letter sent to Attorneys, McManus, Ernst & Ernst at New York thanking them for their letter of the 4th discussing the Bankruptcy proceeding at New York; suggesting that the claims, if any, of the Lessors be barred because not presented in time, and suggesting that there is no need for any Bankruptcy proceeding;

Suggesting also that the disputed claims will be disposed of soon, and that we are prepared to commence shortly with the work of the final accounts of Receivers. [510]

Lengthy letter sent to Attorney, Stanley M. Arndt, re claim of David Matthews, acknowledging receipt of carbon copy of letter sent by him to Judge Nebeker together with a copy of his comments on the testimony; suggesting that he (Arndt) has made some new statements and discussing at some length the various features of the case.

Letter sent to Attorney H. L. Chamberlain of Modesto re. Haymon-Krupp (Grace Cutting)

claim in suit suggesting that claim has been allowed as a general claim and that the additional claim for costs and Attorneys fees has been rejected; that if he has any authorities which would warrant payment of these items I should like to have them; suggesting also that it would be agreeable to us to have the matter determined before the master.

Conferred at length with Mr. Lieurance and Mr. Hershey.

March 12.

Letter dated March 10th received from Attorney Stott enclosing copy of letter received by him from attorney Samuel Weinstein re Brill Stores claim making an offer of settlement; suggesting that he (Stott) would make no recommendation and asking me to advise him as to my wishes in the premises.

March 14.

Letter received from Attorney Plowden Stott dated Mar. 12th, 1927, enclosing Affidavit of Publication and copy of letter sent to Mr. Lieurance re attempted sale of long time sublease of the Alder Investment Co.

Telegram sent to Attorney Victor Ford Collins suggesting that Judge Nebeker expects to report on the Weber case within the next two days, and that I will wire him on approval of report.

Telegram received from Victor Ford Collins suggesting he had not heard from us concerning approval of the Federal Court in the matter of his client's claim. [511]

March 15.

Letter received from Attorneys McNoble & Arndt enclosing copy of letter sent to Judge Nebeker making correction in memorandum of testimony; discussing further the basis of employment of Dave Matthews, etc.

Went to San Francisco and conferred with Attorney B. D. Townsend at his office spending entire afternoon in making this trip.

March 16.

Letter received from the Silverstripe Co. of New York asking about further dividends.

Called at office of Special Master, Nebeker, relative to reports.

Had conference with Mr. J. L. Taylor of the Eastman-Gibbons Co.

Sent wire to Attorney Victor Ford Collins at Los Angeles relative to claim of his client.

Conferred over 3 hours with Mr. Lieurance.

March 17.

Hearing before Special Master, Robert F. Maguire, at Portland on rejected claim of Stein Bros., Attorney Plowden Stott, my local counsel, representing me.

Hearing had before same Master on rejected claim of Sigwart Electric Co., same counsel representing me. [512]

March 18.

Letter sent to Attorney Francis J. Heney and B. D. Townsend concerning draft of proposed stipulation to take place of stipulation already signed by Mr. Lieurance and me on March 15th and which I said I would sign suggesting that I feel certain Mr. Lieurance will sign also.

Telegram sent to Victor Ford Collins of Los Angeles stating that approval of U. S. District Court Judge has been obtained on the report of the Special Master and that Receiver's check is being forwarded him by air mail this morning.

Had lengthy consultation with Mr. Lieurance and Mr. Hershey, the auditor, relative to the preparation of Final Account.

March 19.

Letter dated March 15th from Attorney B. Chandler Snead of New York asking about further dividends.

Letter dated March 17th from Attorney Plowden Stott stating that Applegate claim has been submitted to the Court and that a decision is expected next Monday; that he has received a letter from Attorney Samuel B. Weinstein practically admitting that his client has not a good claim and asking him to recommend to me a compromise settlement on the basis of $250.00; that the Ambler claim was submitted to the Special Master

and that an opinion will be rendered shortly; that the Stein Brother's claim comes before the Master on March 17th, the day the letter was written at 2 o'clock; that the Albany Democrat Herald's claim has not yet been submitted; and containing some comment on the last matter concerning leasehold premises of the Portland store.

Another letter received from Attorney Plowden Stott dated March 17th, stating the hearing on the claim of Stein Brothers for $4786.65 and the [513] claim of Sigwart Electric Company came on for hearing before the Special Master; stating that these claims were denied as preferred claims and that the opinion will soon be filed and copies of the orders will be sent when they are made; also commenting on the testimony at length.

Received letter from Attorneys Lowenthal, Collins & Lowenthal acknowledging receipt of telegram re: settlement of claim of their client on basis agreed.

Examined a number of claims.

Had long consultation with Mr. Lieurance and Mr. Hershey.

March 21.

Consulted several times during day with Mr. Hershey and Mr. Lieurance.

March 22.

Spent entire day working on changes on stipu-

lation proposed through Attorney Francis J. Heney and in consultation with Mr. Lieurance.

March 23.

Obtained dismissal of action Haymon-Krupp Company brought in the name of Grace Cutting vs. R. A. Pilcher Co. Inc. pending in Stanislaud County, California.

Letter dated March 22nd received from Attorneys Brown & Chamberlin of Modesto re: claim of Haymon-Krupp Company, admitting that we have right to [514] discharge of attachment and that our action in rejecting claim as preferred is correct.

March 24.

Letter received from Globe Indemnity Company re: Bond #508435 of A. F. Lieurance.

Several consultations with Mr. Lieurance during the day.

March 25.

Letter sent to Globe Indemnity Company, Oakland, replying to letter of 24th and letter inclosing agreement signed by Receiver Lieurance concerning bond written by this company through its Seattle agency; suggesting also that the original which was left in blank be returned to me.

Letter sent to Attorney Stanley M. Arndt of Stockton re: Dave Matthews vs. R. A. Pilcher Co. Inc. and A. F. Lieurance suggesting that Mr. Lieurance brought in copy of the com-

plaint in the action brought in San Joaquin County #20637, and suggesting that service was probably made through oversight in view of the fact that the claim is being litigated in the Federal Court before the Special Master and suggesting that the Superior Court action should be dismissed immediately.

Letter sent to B. Chandler Snead of New York re: Diamond Match Company's claim suggesting the next dividend will probably be for ten per cent.

Letter sent to Attorney H. H. Chamberlin of Modesto replying to his two letters of March 22nd re: Haymon Krupp claim stating that claim for Attorney fees and [515] costs is not proper and had been disallowed.

Letter sent to Attorney Stott relating to the various claims; and in which we give him such facts as we have concerning the claim of the Albany Democrat Herald.

Conferred for several hours with Receiver Lieurance and Phillip Hershey.

March 28.

Telegram received from Attorney Victor Ford Collins stating that Mr. Deering of the Weber Showcase and Fixture Company will be in San Francisco tomorrow and is desirous of a copy of the order of settlement so that he can take it to Oregon and Washington.

Letter received from Globe Indemnity Com-

pany re: bond of A. F. Lieurance in reply to my letter of March 25th.

March 29.

Letter sent to Attorney Stanley M. Arndt of Stockton in answer to his letter of March 28th in the matter of the suit of Dave Matthews vs. R. A. Pilcher Co. Inc.

Letter from Special Master F. O. Nebeker relative to the claim of Weber Showcase and Fixture Co.

Letter received from Attorneys McNoble & Arndt of Stockton asking if copy of letter that I had sent to him had been sent to the Master. [516]

March 30.

Conferred with Mr. Lieurance and Mr. Hershey most of the day.

April 4.

Letter dated April 1st received from Attorney Stott sending me copy of the order denying claim of Albert D. Applegate as preferred claim and allowing it as a general claim and stating that he has arranged for the Attortorneys for the Albert D. Applegate Company to take up matter of that claim next week.

Conferred with Mr. Lieurance and Mr. Hershey for upwards of three hours relative to claims in the matter of Final Accounting.

April 5.

Letter sent to Plowden Stott in reply to his letter of April 1st relative to order in the

matter of disputed Applegate claim; also concerning Albany Democrat Herald; stating that we have a large force working on the final account of the Receivers and suggesting that we should have the account completed in the next ten days or two weeks also making suggestions concerning other disputed claims in Oregon.

Letter sent to Attorney Stanley M. Arndt of Stockton in reply to his of the 28th ultimo concerning disputed claim of Dave Matthews and suggesting that it is agreeable to me to have him send to Special Master F. O. Nebeker a copy of his letter sent to me on March 12th or to send me other information which may throw light upon the subject.

Went to the office of Special Master F. O. Nebeker [517] concerning the Eastman-Gibbons claim.

Spent part of the day consulting with Mr. Hershey and Mr. Lieurance relative to the Final Account of Receivers.

April 6.

Letter sent to Sheriff of Stanislaus County re: Humphreys and Matthews vs. R. A. Pilcher Co. Inc., proceeding No. 20074, pending in the Superior Court of San Joaquin County, handing him instructions signed by the Attorney for the plaintiff to turn over to Mr. Lieurance, the Receiver, all moneys under attachment and particularly moneys levied

upon the People's State Bank at Turlock and asking that the necessary releases be given to the Bank.

Consulted with Mr. Hershey relative to the Final Account for over two hours.

April 8.

Hearing at Portland before the Special Master Robert F. Maguire in the matter of the rejected claim of the Albany Democrat Herald; Attorney Plowden Stott my local counsel attended.

Worked four hours on the proposed report of Receivers.

April 9.

Letter sent to Attorney Stanley M. Arndt of Stockton [518] re: Dave Matthews vs. R. A. Pilcher Co. Inc. acknowledging receipt of a copy of letter sent by him to Judge Nebeker; and suggesting that I did not care to make any further reply for the reason that the record in the case would speak for itself.

Received letter from Attorney Stanley M. Arndt inclosing copy of letter sent to Judge Nebeker commenting on the testimony given in the claim of Dave Matthews. Conferred at length with Mr. Lieurance.

Stipulations received from the office of Mr. Heney.

Consulted with Mr. Lieurance and Mr. Heney several times during day.

April 11.

Sent letter to Attorney Plowden Stott in reply to his of April 8th stating that matters are almost completed in Oregon; making suggestions as to the Final Accounts and the times for hearing thereof.

Letter dated April 8th received from Plowden Sott in reply to mine of April 5th stating that the hearing on the claim of the Albany Democrat Herald comes up today, stating further that each of the opinions of the Master so far given have been filed with the Court and that the Orders of the Court will be sought upon the lapse of twenty days from the time of filing of the opinions; also asking about the filing of the Final Accounts.

Consultation and advice with Mr. Lieurance and Mr. Hershey for four hours.

April 12.

Letter sent to Attorney Francis J. Heney confirming [519] suggestion made over the telephone that the stipulation should contain a recital that Mr. Lieurance had done all of the work of the Receivers in the Western jurisdictions and noting the fact that such a change would be agreeable to him; suggesting the language desired by Mr. Lieurance and suggesting that it would give me pleasure to hand such stipulation to him next week.

Consultation with Mr. Hershey, the auditor, lasting *our* four hours.

April 15.

Letter sent to Attorney Stanley M. Arndt re: Dave Matthews vs. R. A. Pilcher Co. Inc., and Lieurance suggesting that my understanding was that the action was to be dismissed and asking what he had done in the premises.

Consultation with Special Master Nebeker at his office.

Prepared notices to creditors to be given in the four ancillary jurisdictions concerning the time to be fixed for the final hearing on the Receivers Final Account and Report and Petition.

Conferred with Mr. Hershey several times during the day.

April 16.

Spent entire day in the preparation of the Report of the Receivers. [520]

April 18.

Letter received from Attorney Plowden Stott inclosing copies of Orders and miscellaneous information concerning claims.

Letter received from Attorney John C. Hogan of Aberdeen, Washington.

Letter sent to John C. Hogan.

Prepared for use in the matter of Dave Matthews vs. R. A. Pilcher & Co. Inc. and A. F. Lieurance proceedings in the Superior Court of San Joaquin County, the following: Motion for Change of Place of Trial, Affi-

davit of A. F. Lieurance and Affidavit in Support of Motion, Affidavit of Merits, Demand for Change of Place of Trial and Demurrer to Complaint.

Consulted and advised with Mr. Lieurance and Mr. Hershay several times during the day.

April 19.

Letter sent to Sheriff of San Joaquin County re: Dave Matthews vs. R. A. Pilcher & Co. et al., handing him for service on Attorneys McNoble and Arndt and upon Dave Matthews copies of the Motion for Change of Place of Trial, Affidavit in Support of Motion, Affidavit of Merits, Notice of Motion, Demand for Change of Place of Trial and Demurrer to Complaint.

Letter sent to County Clerk of San Joaquin County re: the above case and inclosing the original instruments mentioned above for filing.

Letter sent to Stanley M. Arndt re: Matthews vs. R. A. Pilcher & Co. Inc., the proceeding mentioned above, stating that I certainly had the understanding that the action would be dismissed and suggesting [521] as it is his intention to have the matter of his claim thrashed out in the State Court, as well as, in the Federal Court I would have to take steps to prevent such a situation and that I would have to apply to the U. S. District Court for an Order to Show Cause why the

action pending in San Joaquin County should not be dismissed and Mr. Matthews punished for contempt.

Letter received from Attorneys McNoble and Arndt stating that action will not be dismissed unless Special Master allows the claim to be paid in full.

Letter from Special Master Nebeker inclosing copy of Report made to the U. S. District Court.

Consulted and advised with Mr. Lieurance several times during the day.

April 20.

Prepared draft of Petition for Order to Show Cause to be directed against Dave Matthews; also prepared draft of proposed Order to Show cause.

Consulted and advised with Mr. Lieurance in the premises.

April 21.

Letter from Deputy Sheriff of San Joaquin County stating that all papers had been served.

April 22.

Consulted and advised with Mr. Lieurance and Mr. [522] Hershey most of the day.

April 25.

Letter to Special Master F. O. Nebeker.

Letter to U. S. Marshall in San Francisco, relative to contempt proceedings vs. Dave Matthews.

Letter to Attorney Stanley M. Arndt.

April 26.

Consultation with Mr. Hershey for several hours.

Worked three hours on law in Matthews case.

Consultation and advice with Mr. Lieurance several times during the day.

April 27.

Consulted and advised with Mr. Hershey for one hour.

Letter from Attorney Plowden Stott stating that Judge McNary signed Order approving opinion of Special Master disallowing claim both as preferred and general in the matter of J. C. Brills Store; stating that this closes all of the contested matters in Oregon and asking when final account will be filed.

Lengthy letter (four closely written pages) to Stanley M. Arndt re: Matthews vs. R. A. Pilcher Co. Inc., discussing in detail his letter of April 26th and the matter of the contempt of Mr. Matthews in bringing this Superior Court action [523] in San Joaquin County after having been restrained by Order of the Federal Court as return as February 19th, 1927, after he had submitted this cause to the Special Master; also of his contempt in bringing suit against the Receivers without obtaining permission from the Federal Court so to do; discussing at length the law covering contempt and citing numerous cases and giving excerpts therefrom.

Letter received from Attorneys McNoble and Arndt concerning the action brought by them on behalf of Dave Matthews; stating amongst other things that suit cannot be dismissed until after the contempt proceedings were discharged.

April 28.

Consulted and advised with Mr. Hershey and Mr. Lieurance concerning accounting and report for over six hours.

Letter sent to Attorney Plowden Stott in reply to his of the 25th stating that the final account and report are nearing completion.

Letter to Clerk of the U. S. District Court at San Francisco, sending Affidavit of Sheriff William H. Reicks of San Joaquin County for filing.

April 29.

Continued to work on preparation of Petition and Orders re: proposed dividend of ten per cent.

Conferred with Mr. Lieurance for over two hours; consulted and advised with Mr. Hershey in excess of one hour. [524]

April 30.

Received Cost Bill re: Berg vs. R. A. Pilcher & Co. Inc., examined same and conferred with Mr. Lieurance.

Conferred with Mr. Hershey for over two hours concerning accounts. [525]

May 2.

Letter sent to Judge Robert S. Bean, Portland, Oregon, stating that the final account of the Receivers is almost ready; suggesting that some of the Creditors are anxious to get some money and that Receivers are desirous of paying an additional dividend amounting at this time to 10%; suggesting that Judge Hand of New York so we are advised by wire made an Order permitting payment of this dividend, and that we are enclosing Petition and draft of proposed Order for him to sign, and asking the Judge when Order is signed to have his Secretary wire me to that effect, charges collect, and mail me a carbon copy of the Order.

Telegram from Attorney, Stanley M. Arndt of Stockton threatening that unless contempt proceedings against David Matthews are dismissed immediately he will hold me personally responsible.

Letter received from Attorneys, McNoble & Arndt, discussing contempt proceedings.

Conference with Mr. Hershey and Mr. Lieurance lasting 4 hours.

May 3.

Letter received from McNoble & Arndt of Stockton stating that Motion for Change of Venue was put over one week.

Conference with Mr. Hershey and Mr. Lieurance lasting 3 hours.

May 4.

Received cost bill in the matter of M. M. Berg.

Sent letter to Attorney W. Coburn Cook, his attorney.

Examined law in the matter of contempt proceedings against Dave Matthews. Spent all day.

May 5.

Letter received from Attorney, John C. Hogan, of [526] Aberdeen, Wash. requesting copy of Claim filed by Weber Showcase Company, and copy of any order approving settlement.

May 7.

Telegram sent to Attorney, Stanley M. Arndt, re: proposed continuance of Order to Show Cause to May 16th.

Letter to Clerk of Judge St. Sure's Department relative to proposed continuance to May 6th in the matter of the Order to Show Cause against Dave Matthews.

Several conferences during the day with Mr. Hershey, the auditor.

May 9.

Order to Show Cause against David Matthews continued to May 16th.

Several conferences had with Mr. Lieurance during the day.

May 10.

Letter received from Attorneys, McNoble & Arndt, acknowledging telegram re. Order to Show Cause; stating that Mr. Matthews had engaged San Francisco Attorneys to defend

him and disputing certain statements set forth in the petition.

Spent 7 hours in the matter of the preparation of final accounts and reports.

May 11.

Spent all day in the work of preparing reports and petition and in conference concerning final account. [527]

May 12.

Telegram received from Mr. Lakin, Clerk of the United States District Court at Seattle, stating that dividend Order was signed today, and that copy has been mailed to me as requested.

Telegram received from G. H. Marsh, Clerk of the United States District Court, Portland, stating that Order authorizing dividend was signed today by Judge Bean.

Worked several hours in the matter of the preparation of report, and in conferring with Mr. Hershey concerning account.

May 13.

Spent all day preparing for the hearing on Order to Show Cause against Dave Matthews.

Telegram received from Judge Webster of Spokane, stating that Order authorizing dividend was signed and filed today, and that he was mailing me carbon copy.

Telegram received from Eugene D. Graham, County Clerk of San Joaquin stating that Demurrer and Motion in case of Matthews

against Pilcher and Lieurance was continued to May 16th.

Telegram sent to Attorneys McManus, Ernst & Ernst at New York asking if copies of original Order of Appointment June 7th, 1926, were mailed to all creditors of Pilcher Company, and particularly to Humphreys and Matthews at Stockton, California, and asking for reply wire today.

Telegram sent to Sherman of San Joaquin County asking him to write me names of persons or firms served and dates of service by him on persons mentioned in previous letter.

Telegram sent to County Clerk at Stockton asking him to wire me if case against Matthews and receiving No. 20,637 has been dismissed, and if not that if any disposition has been made with Demurrer and Motion for Change of Venue. [528]

May 14.

Letter sent to Eugene D. Graham, Clerk of San Joaquin County, California, asking that matter of the Demurrer and Motion re. Dave Matthews vs. the Pilcher Company and A. F. Lieurance, receiving No. 20,637, go over for another week, and giving as a reason for this request that there is a proceeding pending in the United States District Court at San Francisco which comes up next Monday which may terminate this proceeding.

Worked the rest of the day on report and account and petition.

May 16.

Attended United States District Court at San Francisco in the matter of the contempt proceedings against Dave Matthews. Attorney P. A. Sommer appeared on behalf of the defendant, and at his request the matter was continued one week.

Consulted with Mr. Lieurance and Mr. Hershey for several hours after my return in the afternoon.

May 17.

Worked all day on Receivers report and petition and account.

May 18.

Letter received from G. H. Marsh, Clerk of the United States District Court at Portland, stating that he had received our joint letter and stipulation and Order relative to modification of Order of Dec. 16th, 1926, and that Judge Bean had signed Order May 16th, 1927, and the same was filed on the same day. [529]

May 19th.

Drew up our final stipulation consenting to discharge of Order to Show Cause against Dave Matthews because of stipulation received that Superior Court action pending in San Joaquin County, California, in which Dave Matthews was plaintiff and the Pilcher Com-

pany and A. F. Lieurance were defendants may be dismissed (proceeding No. 20,637).

Went to San Francisco and filed Receivers final account and report and petition together with Inventory of merchandise taken in all stores and with complete statement of claims, and obtained an order from Judge St. Sure fixing June 27th, 1927, at the hour of 10:00 o'clock a. m. as the time for the hearing.

Called at the office of the Attorneys, Townsend & Heney and left copy of account and copy of report, and a copy of the petition, and also a copy of the Order of Judge St. Sure fixing the time of hearing.

Prepared Notices to be sent to all of the creditors of the time fixed.

Left stipulation and draft of proposed Order discharging Dave Matthews from the contempt Order.

Consulted and advised with Mr. Lieurance and Mr. Hershey.

May 20.

Received letter from Attorney Plowden Stott dated May 17th, 1927, suggesting that a number of creditors had asked him when final account and report were to be filed.

Consulted with Mr. Hershey relative to the account to be filed in Oregon spending 3 hours in this work.

May 23.

Sent letter to Attorney Guard C. Darrah re. Schuler-Ruhl claim.

Letter sent to Attorney Plowden Stott stating that we have been working on the final account and report for [530] several weeks, and that we have filed the account and petition at San Francisco; that the Court there has fixed Monday, June 27th, 1927, as the time for the hearing; stating also that we are now working on the preparation of the necessary papers for the Oregon jurisdiction; stating further that under a stipulation made with the Committee representing the Eastern and Western creditors we are to give all creditors at least 30 days notice by mail of the time fixed for the hearing; suggesting that as Judge Bean has heard all the matter so far it would be well to have him hear the petition, etc., and suggesting that he ascertain if Judge Bean will be in Court during the month of July.

Letter sent to Attorney Chamberlain re Haymon-Krupp claim.

May 24.

Letter received from Eugene D. Graham, County Clerk of San Joaquin County, stating that Motion for Change of Venue had been continued and requesting that on the next hearing the Motion be argued.

Spent several hours in consultation with Mr. Hershey and Mr. Lieurance.

May 25.

Consulted with Mr. Hershey several times during the day.

May 26.

Consulted with Mr. Hershey several times during the day.

May 27.

Consulted with Mr. Hershey several times during the day. [531]

May 28.

Letter received from Attorney Plowden Stott dated May 26th, 1927 relative to hearing on final account during the month of July and the fixing of fees, etc.

June 1.

Worked on report and petition for use in Northern jurisdiction, spending all day.

June 2.

Worked on report and petition for use in Northern jurisdiction.

June 3.

Worked on report and petition for use in Northern jurisdiction.

June 4.

Interviewing Attorney P. F. Sommer at San Francisco re. Matthews matter.

June 6.

Had several conferences during the day with Mr. Lieurance and Mr. Hershey.

June 7.

Worked on preparation of report, final account, etc. for use in Northern jurisdictions. [532]

June 9.

Further work on reports for use in Northern jurisdictions.

June 10.

Further work on reports for use in Northern jurisdictions.

June 13.

Worked on preparation of reports and petitions for Northern jurisdictions.

Consulted and advised with Mr. Lieurance.

Sent letter to Attorney Plowden Stott sending him Receivers report accompanying final account and petition of Receivers for settlement and approval of final account and report and for Order fixing fees; suggesting that under separate cover I am forwarding complete inventory; complete statement of all claims; final account of Receivers; and suggesting that all these papers be filed at once and that he obtain for us if possible as a day for the hearing Monday, July 25th, 1927; enclosing form of Order fixing time for hearing; and asking him as soon as Order has been signed to wire me immediately to this effect giving the name of the Judge who signed the Order and the date of the hearing, and calling to my attention any change in the form which might be made, and requesting that copy of order be sent me by mail.

Sent by American Express (insured) to Attorney Plowden Stott at Portland, Oregon,

complete inventory of all merchandise on hand June 27th, 1926, statement of all claims received and final account of Receivers.

June 14.

Worked all day on the matter of the preparation of the reports and petitions for use in the Eastern and Western districts of Washington. [533]

June 15.

Spent all day in the matter of the preparation of the reports and petitions for use in the Eastern and Western jurisdictions of Washington.

June 16.

Telegram received from Attorney R. L. Blewett of Seattle re claim of C. W. Kelly suggesting that if agreeable to me he will have hearing on the Order to Show Cause set for the 20th continued two weeks in hope that we can reach an adjustment of the matter.

Letter sent to Arthur F. Gotthold, New York.

Letter sent to Attorney R. L. Blewett, Seattle.

Letter sent to M. Mandel.

Letter sent to Attorney Victor Ford Collins at Los Angeles relative to claims.

June 17.

Telegram sent to Arthur F. Gotthold, New York, stating that I have just seen wire to Mr. Lieurance and that Mr. Lieurance is out of town; that all papers have been forwarded to Oregon and Washington but that

I have not yet been advised of the dates of hearing; that I have suggested July 25th for hearing in Portland, July 26th for hearing in Spokane, and August 5th for hearing at Seattle, and that when information is received we will send same to him forthwith; also suggested that I wrote him a letter yesterday.

Telegram sent to Attorney Robert L. Bluett, Seattle, Washington, in reply to his wire stating that I have sent claim and correspondence to Attorney Nelson R. Anderson, at Seattle, with suggestions that he handle matter for me and asking him to get in touch with Mr. Anderson.

Letter received from Attorney Plowden Stott replying to my letter of the 13th commenting upon account [534] and time to be fixed.

Telegram from Attorney Plowden Stott informing me that Order fixing time had been signed by Judge John H. McNary fixing July 25th as time for hearing.

June 18.

Telegram received from D. F. Nelson, Secretary to Judge Neterer fixing August 1st as the time for the hearing, and that the Order requires Notice to be published 30 days in the Daily Journal of Commerce at Seattle and that copy is to be mailed to each creditor in this jurisdiction.

Telegram received from Helen Walmer, Secretary to Judge Webster, that order fixing Tuesday July 26th as time for hearing on final account had been signed as submitted.

Prepared Notices in conformity with the Order of Judge Neterer.

Consultation and advice with Mr. Lieurance and Mr. Hershey.

June 20.

Prepared Notice to Creditors in Northern Jurisdictions.

Conferred with Attorney B. D. Townsend at San Francisco.

Conferred several times during the day with Mr. Hershey.

Letter received from Harry C. Clark, Clerk of the United States District Court at Spokane, Washington, acknowledging receipt of final account of Receivers together with report and petition, and stating that Judge Webster had set hearing for July 26th, 1927.

Received letter from Attorney Nelson R. Anderson of Seattle, Washington, re disputed claim of Kelly and the hearing thereof. [535]

Letter dated June 17th received from Attorney Plowden Stott acknowledging receipt by express of Account, Inventory, and Statement of Claims.

Another letter received from Attorney Stott stating that the time fixed for the hearing

of the Final Account, etc. was July 26th, 1927.

June 23.

Letter sent to the Clerk of the United States District Court at Portland enclosing Affidavit of Mailing of Notices to all creditors of the Pilcher Company of the time of hearing on final account.

Spent several hours going over copies of accounts with Mr. Lieurance.

June 24.

Consultation and advice with Mr. Lieurance and Mr. Hershey.

June 25.

Spent all day preparing for hearing on Monday, the next, in the District Court of San Francisco on the Receivers final account, report and petition.

June 27.

Attended United States District Court at San Francisco on hearing of final account and report and petition of Receivers; objections filed in open Court on behalf of certain creditors by Attorney B. D. Townsend of San Francisco, and the hearing continued to August 8th, 1927.

Conferred with Attorney, B. D. Townsend, at his office later in the day and examined copy of objections with Mr. Lieurance and Mr. Hershey spending the entire day in this matter. [536]

June 28.

Conferred several times with Mr. Lieurance and Mr. Hershey concerning objections, spending three-fours of the day in so doing.

June 29.

Received and examined Motion to Strike and Answer to Order to Show Cause in C. W. Kelly vs. Pilcher Company in United States District Court at Seattle; Attorney Nelson R. Anderson, my local counsel, filing originals on my behalf.

June 30.

Spent 4 hours in preparing data for use in hearing on final accounts in the Northern jurisdictions.

July 1.

Wrote letter to Globe Indemnity Company re. bonds and cancelling of obligations thereunder.

Sent letter to G. A. Pearson, Everett, Washington, re. claim of C. W. Kelly.

Received two letters from Mr. Gotthold of New York.

Received letter from Attorney, Nelson R. Anderson, re Kelly vs. Pilcher.

Sent letter to Attorney Anderson at Seattle.

July 2.

Spent 4 hours preparing data for hearings in the North West.

July 6.

Received telegram from Mr. Gotthold stating

he [537] desired to close estate without delay.

Telegram to Mr. Gotthold in reply.

Letter sent to Mr. Lieurance.

Letter sent to Attorneys, Heney & Townsend.

Long distance telephone conversation with Mr. Lieurance.

Spent 2 hours in the matter of preparation of hearing in the North.

July 7.

Worked all day in going over the data for use on the hearing of the final accounts.

July 8.

Conferred 3 hours with Mr. Hershey concerning data to be used on the hearing of final account.

July 9.

Spent all day getting ready for the hearings in the North West on final account, etc.

July 11.

Spent 7 hours going over data in preparation for the hearings on the final account in the North West.

July 12.

Spent 10 hours getting ready for hearings in the North West; examining data and going over the law concerning closing of Receivership administration. [538]

July 13.

Spent 5 hours preparing for hearings in Northern jurisdictions.

July 14.

Spent all day getting ready for hearings in the North West.

July 15.

Spent all day conferring with Receiver Lieurance and Auditor, Phillip A. Hershey, in consultation and advice, and in the preparation of an Answer to the legal objections and exceptions filed by Attorney B. D. Townsend to the final account of Receivers.

July 16.

Spent 4 hours in consultation with Mr. Lieurance and Mr. Hershey, and in the preparation of Answer to objections filed by Attorney B. D. Townsend on behalf of certain creditors.

July 18.

Spent all day preparing data for hearings on accounts and petitions in the North West Jurisdictions. [539]

In addition to the foregoing, my local counsel at Portland, for me and on my behalf, performed the *follow servides*:

Modish Cloak & Suit Company had instituted an action in the Circuit Court of Multnomah County, Oregon, against R. A. Pilcher Co. Inc. for the recovery of the sum of $878.45. An attachment was issued and a keeper placed in charge of the store by the Sheriff's office. Obtained an undertaking to discharge the attachment from Royal Indemnity Company, served the same upon

the counsel for plaintiff, together with a motion to make the Complaint more definite and certain and a demand for a Bill of Particulars. Filed all these papers in the Circuit Court of Multnomah County, Oregon. Removed the keeper and kept the store open for business. Prepared a stipulation and order of dismissal at the time this claim was paid in full. Had several conferances with Mr. Millard, the local manager, and Mr. Eliassen concerning this case.

On or about July 20, 1926, Wiley Investment Company, the owner of the store room where the Portland store was situated, notified Alder Investment Company, the lessee, that by virtue of a mechanic's lien for the sum of $6102.37 filed by Kilgreen & Flynn, against the property of Wiley Investment Company 131–133 Fourth Street, Portland, Oregon, that the lease of the said Alder Investment Company was in danger of being cancelled, said lease providing that the lessee at all times would keep the property free [540] and clear of mechanic's liens or any liens and would pay the same immediately upon notice thereof.

Alder Investment Company immediately notified its sublessee, George L. Greenfield, who immediately notified his sublessee, Wright Shoe Company, who immediately notified its sublessee, R. A. Pilcher Company, that unless the lien was paid at once that the lease would be cancelled.

Discussed matter with Mr. Eliassen and had agreed upon the proposition that if this contingency arose Mr. Stott would undertake to obtain

the permission of the Wiley Investment Company and all other sub-lessees, except R. A. Pilcher Company, to accept a bond agreeing to save all of them harmless for or on account of said alleged mechanic's lien of Kilgreen & Flynn.

Spent all day the 20th and 21st of July in negotiating with these people and corporations and in obtaining from the Globe Indemnity Company of New York, a bond and in drafting a bond which was satisfactory to and met with the approval of all of the interested persons and corporations as well as the surety company. This necessitated three drafts of the proposed bond.

Spent all day July 26th in addition, closing up this matter, securing all the signatures and correcting minor objectionable details in the bond.

Had numerous conferences with the attorneys for Kilgreen & Flynn in an effort to get them to file a claim as general creditor. I raised the point that their clients had not complied with the mechanic's lien laws of the State of Oregon in that they [541] had notified the owners of the fee simple title of the delivery of the materials and performance of the work.

The matter dragged along until early in January, 1927. Kilgreen & Flynn through their attorneys filed a suit in the Circuit Court of Multnomah County, Oregon, in an effort to foreclose their lien. This lien was for the sum of $6102.30 in addition to this they asked for interest at the rate of 6% per annum from June 11, 1926, the further sum of $1.45 for recording the lien and $700 attorney's fees.

In order to protect our bond, I entered into a stipulation with the attorneys for plaintiff for time within which to appear in this case. I had numerous conversations with them in negotiating the settlement. During the month of February, 1927, this suit was dismissed, owing to the fact that Kilgreen & Flynn agreed to accept their claim as a general creditor. Prepared stipulation and order of dismissal and delivered a certified copy of same to the surety company and released the Receivers from any liability on account of the bond. It was valuable to the estate to keep the Fourth Street store open and as a running concern.

In addition to the above, spent a half day in this matter on the 17th day of February and half day on the 18th day of February.

The Sheriffs of Umatilla and Klamath Counties, Oregon, threatened to close the stores in Pendleton and Klamath Falls for the failure to pay the personal property taxes against the stores for the years 1925 and 1926. Arranged with the Sheriffs [542] to allow these stores to remain open until the moneys from Oakland could arrive in payment of the 1925 taxes, and with their consent prepared and filed petitions with the Boards of Equalization in each of these counties in an effort to obtain a reduction of the 1926 taxes.

APPLEGATE CLAIM: Preferred claim of $454.41. Claim filed by filing petition direct in United States Court on or about October 20, 1926. Brought up on motion in United States Court. Answer prepared denying allegations in petition.

Matter brought up in United States Court on motion day. Matter referred to Miss Bell, Judge Bean's stenographer and E. O. Immel for the purpose of taking testimony. Spent half a day taking testimony of Mr. Maloney, of the Eugene R. A. Pilcher store. Spent half day in this matter on February 7th, half day on February 13th, all day on the 14th going to Eugene, Oregon, where took the deposition of Applegate's witness. Spent one day in preparation of brief. Spent part of day in preparation of Order disallowing the claim in full as preferred claim and allowing it as a general claim.

J. C. BRILL STORES: Preferred claim of $1249.71. March 2nd spent half day preparing for hearing of this claim. March 3rd spent half day in hearing of this claim before Robert F. Maguire, Special Master. Prepared order for confirmation of Master's report, denying the claim in full as either a preferred or general claim.

AMBLER CLAIM: This was a preferred claim for $1617.91. Claim presented by filing a motion for an Order allowing claim. Spent half day March 3rd on the law and facts preparing for hearing [543] on this claim. Spent half day March 4th in the hearing of this claim before Special Master. $1005.25 was allowed as a preferred claim and $666.66 as general claim. Prepared order allowing claim in part as preferred and part as general claim.

L. B. SIGWART: Preferred claim for $448.51. Spent half day March 13th on the law and facts

preparing for this hearing. March 14th spent half day on hearing of this claim before Special Master. Claim allowed as general and denied as preferred. Prepared order confirming report of Special Master.

STEIN BROTHERS: Claim for $4786.65. March 14th spent one day on the law and facts preparing for the hearing on this claim. March 15th spent half day in the hearing of this claim. Claim disallowed in full as preferred and allowed in full as general. Prepared order confirming report of the Special Master.

ALBANY DEMOCRAT HERALD: Preferred claim for $520.05. April 7th spent half day in preparation for hearing of this claim. April 8th spent half day in hearing of this claim.

February 28th spent half day in preparing notice of publication of offer to sell sub-lease in Portland store and publication of same and attended to the publication of the same in the Oregon Daily Journal.

In connection with this work, wrote 131 letters and sent 39 telegrams and have held conferences with creditors, attorneys for creditors and prospective bidders.

In addition to the foregoing, my local counsel at Seattle represented me in the matter of an Order to Show Cause [544] obtained on behalf of C. W. Kelly, claimant, who insisted upon having his claim allowed as a prefered claim. The Order to Show Cause was made on June 3, 1927, by Judge Jeremiah Neterer, United States District Court Judge at

Seattle. My local counsel appeared in Court at the three hearings and obtained an Order discharging the Order to Show Cause on the 1st day of August, 1927.

1927.

July 19.

Had conference with Attorney Francis J. Heney at his office in San Francisco, spending one-half day in making the trip.

Spent two hours in conference with Mr. Lieurance during the latter part of the afternoon.

July 20.

Conferred with Mr. Lieurance and Mr. Hershey for three hours.

Started for Portland to attend hearing on Final Account of Receivers on July 25th.

July 21.

En route to Portland.

Letter received at my office from Globe Indemnity Company (Seattle agents, Sparkman & McLean Co.) asking for advice concerning Receivers' bond.

July 22.

At Portland, interviewing local counsel, Mr. Plowden Stott, and a number of attorneys.

[545]

July 23.

Spent entire day with Attorney Stott and other attorneys including Attorney Teiser, local counsel for objectors.

July 24.

Sunday. All day at Portland.

July 25.

Letter received at my office from Plowden Stott re fee for services rendered by him.

Telegram sent by me from Portland to Alex Winston, Esq., my local counsel at Spokane, suggesting that he meet me the following morning re court hearing.

Telegram received from Alex Winston, Esq., stating that he will meet me at his office tomorrow morning.

Appeared in U. S. District Court at Portland before Judge Robert S. Bean in the matter of hearing on Final Account of Receivers and their report of administration and petition for settlement thereof and fixation of fees. On behalf of certain San Francisco creditors, objections were filed by Attorney Teiser on behalf of Attorneys Joseph Kirk, Francis J. Heney and B. D. Townsend. An effort was made to proceed with the hearing but as it became evident that the objectors intended to take testimony of certain New York witnesses, the matter of the hearing of the objections was referred to the Special Master, Robert F. Maguire, Esq.

Spent rest of day interviewing attorneys and in conference with local attorney, Mr. Stott.

Left in the evening for Spokane.

July 26.

At Spokane. Met Attorney Alex Winston, my local counsel, at eight o'clock in the morning. Remained in conference with him until shortly before ten o'clock. Then attended U. S. District Court, Judge J. Stanley Webster presiding. Because of a jury trial not yet concluded, the matter of the hearing on the Final [546] Account and Report and Petition was passed over until four o'clock in the afternoon.

In the interim, we learned that Attorney Fabian Dodds, local counsel for Francis J. Heney, B. D. Townsend and Joseph Kirk, attorneys representing certain objectors, had received a copy of objections similar to those filed at San Francisco and Portland, and that he had caused them to be filed in the proceeding.

Had lengthy conference with Mr. Dodds and arranged with him to have the matter pending in the jurisdiction of Eastern Washington consolidated with the matters in the other ancillary jurisdictions, and to have all the objections subject to similar actions on the part of the U. S. District Courts at Portland and Seattle heard and determined by the U. S. District Court in and for the Northern District of California.

Stipulations were then drawn and executed; an Order prepared to be based thereon, which my local counsel and I presented to Judge Webster. His signature was obtained to an

Order transferring the matter of the hearing to the U. S. District Court in and for the Northern District of California. Immediately obtained an Order (certified copy) and mailed to my local counsel at Portland, Plowden Stott, a copy of the stipulation and certified copy of Order, suggesting that I would like to have him immediately confer with Attorney Teiser and with Judge Bean and arrange, if possible, to set aside the order of reference to Special Master Maguire and obtain an Order similar to the one obtained from Judge Webster.

Telephoned to Mr. Stott, notifying him of this action and of the fact that he would shortly receive my communication.

Telegraphed to my local counsel, Nelson R. Anderson, at Seattle, asking him to, if possible, find out what attorney would represent the San Francisco objectors and requesting that he take up with him as quickly as possible the matter of the proposed transfer and consolidation of the hearing on the Final Account and Report and Petition.

Received telegram from my office, informing me of service of copy of Notice of taking depositions at New York.

Left that night for Seattle. [547]

July 27.

Arrived at Seattle.

Spent seven hours with local counsel, Nelson

R. Anderson, going over the matter of the account, Petition and Report, and in discussion of proposed consolidation of hearings and in the matter of the Order to Show Cause proceedings still pending in the matter of the claim of C. W. Kelly of Everett, Washington.

Letter received from Plowden Stott in answer to mine of the 26th. Stating that he had received similar order from Judge Dean.

July 28.

Spent all day at Seattle in conference with Mr. Lieurance and Mr. Hershey and several attorneys.

Received letter at my office from Brown & Chamberlain of Modesto, California, asking about further dividend.

July 29.

Spent entire day in examination of papers and in conference with Mr. Lieurance and Mr. Hershey.

Telegram received from my office stating that service had been made of copy of Objections and Exceptions re allowances to Receiver and his attorney.

July 30.

Spent all day in going over Pilcher Company matters and in conference with Mr. Hershey and Mr. Lieurance.

July 31. Sunday.

Aug 1.

Called at office of Nelson R. Anderson at eight-thirty in the morning and finally concluded the arrangement [548] for dismissal of Order to Show Cause proceedings commenced on behalf of C. W. Kelly, claimant.

Conferred concerning proposed consolidation of hearings.

Got in touch with Leopold M. Stern, Esq., who was designated to represent objectors, and arranged with him for stipulation and order to be based on the lines of stipulation and order signed by Judge Webster at Spokane.

Appeared with Mr. Stern and Mr. Anderson before Judge Neterer and obtained above order.

Obtained certified copy of such order; telephoned to Portland to Mr. Stott to ascertain if Judge Bean had vacated his order previously made, etc.

Had further conferences with Attorney Anderson and in the evening left Seattle for Oakland.

Aug. 2.

En route to Oakland.

Aug. 3.

Arrived in Oakland and examined immediately the further copies of Objections sent by attorneys Kirk, Heney and Townsend to my office during my absence.

Examined Notices and Affidavits for taking of

depositions of Arthur F. Gotthold, William Frazer and Walter E. Ernst at New York on August 16th at 10 A. M.

Conferred with Mr. Lieurance concerning same and going over correspondence files for correspondence and other data which might be of use upon the taking of such depositions.

Examination of papers for use in the matter of the depositions at New York City.

Aug. 4.

Conferred for three hours with Attorney Peter J. Crosby who is to represent Mr. Lieurance and me in the matter of the hearing on the Final Account in the matter of the fixation of fees and compensation for him and me.

[549]

Received letter from Plowden Stott re statement of services rendered by him, and compensation and fee.

Wrote letter to Plowden Stott re letter of Mr. Love to William Frazer.

Aug. 5.

Spent five hours in going over and getting together data for taking of depositions at New York.

Aug. 8.

Attended U. S. District Court at San Francisco; matter continued to September 5, 1927; spent half day in San Francisco.

Aug. 9.

Spent all day in preparation for the taking of depositions at New York.

City

Left for New York/to attend taking of depositions of Walter E. Ernst, Arthur F. Gotthold and William Frazer, whose depositions are to be taken on August 16, 1927, on behalf of objectors. (NOTE: While we were attending Court in the Northwestern jurisdictions, during the month of July, the notice of the taking of these depositions was left at my office. We were not consulted concerning the time or the manner of the taking of the depositions. We were not given an opportunity to present written interrogatories. The only privilege given us was contained in the notice that we may appear in person or by attorney and interrogate the witnesses if we so desire. Before leaving I was not apprised of the reason of the taking of the depositions or of the proof expected to be obtained from the witnesses by the objectors).

Aug. 10.

En route to New York to attend taking of depositions of Walter E. Ernst, Arthur F. Gotthold and William Frazer. [550]

Aug. 11.

En route to New York.

Aug. 12.

En route to New York.

Aug. 13.

En route and arriving at New York City.

Aug. 14.

At New York City relative to taking of depositions.

Aug. 15.

At New York City relative to taking of depositions.

Aug. 16.

Attended taking of depositions of Walter E. Ernst and Arthur F. Gotthold before Wm. Polglase, 170 Broadway, New York City, and participated in the examination of these witnesses. (The witness William Frazer was not in the City. He had gone to Europe about a month before the notice given us, we were informed, and *di* not return until after the 26th of August).

Aug. 17.

Called at the office of Wm. Polglase and examined as much of the transcript of the testimony of the witnesses Walter E. Ernst and Arthur F. Gotthold as had been transcribed.

Left for home.

Aug. 18.

En route from New York to Oakland. [551]

Aug. 19.

En route from New York to Oakland.

Aug. 20.

En route from New York to Oakland.

Aug. 21.

En route from New York, arriving at Oakland.

Aug. 22.

Conference with Mr. Lieurance and Mr. Hershey, lasting three hours.

Aug. 30.

Sent letter to Judge Hand of New York, relative to order made by him on July 6th in the matter of the filing of creditors claims with Referee in Bankruptcy at New York City.

Sent letter to Arthur F. Gotthold concerning same matter.

Sent letter to Walter E. Ernst concerning same matter. [552]

RECEIVER'S EXHIBIT No. 3

Consists of the statement prepared and submitted by A. F. Lieurance, concerning the services rendered by him as Receiver; and which document is as follows: [553]

GENERAL STATEMENT OF SERVICES RENDERED BY RECEIVER A. F. LIEURANCE.

INCEPTION OF RECEIVERSHIP.

On the morning of June 3, 1926, without previous notice, I received a telegram from McManus, Ernst & Ernst, Attorneys of New York, stating that I had been appointed Receiver for the R. A. Pilcher Company, Inc., by August N. Hand, Judge of the Federal Court, Southern District of New York.

This was the first notice I had had that the R. A. Pilcher Company was in financial difficulty.

R. A. PILCHER COMPANY.

The R. A. Pilcher Company, Inc., was a merchandising institution, existing under the laws of the State of Delaware. It was engaged in the business of conducting a chain of department stores, all of which were located in the States of Oregon, Washington and California, to -wit: three stores in California, located at Stockton, Turlock and Oroville; seven stores located in the following towns in Washington; Yakima, Tacoma, Bremerton, Monroe, Aberdeen, Everett and Wenatchee; six stores located in the following towns in Oregon; Klamath Falls, Eugene, Pendleton, Roseburg, Portland and Albany. These stores were classed as general merchandise stores and their stocks were made up of dry goods, shoes, clothing, ladies ready to wear, men's ready to wear, men's furnishing goods, ladies and children's furnishing goods, notions, bedding, hats, caps and other lines usually found in a department store.

OBTAINING INFORMATION RELATIVE TO THE RECEIVERSHIP.

Immediately after receiving notice of my appointment as Receiver I conferred with Mr. Edward R. Eliassen, Attorney, 1201 Central Bank Building, Oakland, relative to the duties of a Receiver and just what my accepting [554] this appointment as Receiver would mean. I was informed by Mr. Eliassen that since the suit had been brought in

New York it would first be necessary to find out from New York the purpose of the receivership and obtain, if possible, the future plans of the creditors and stockholders and in a general way learn what both the creditors and stockholders proposed to do and what procedure they would follow under the receivership.

COMMUNICATIONS.

I immediately communicated by telegram with McManus, Ernst & Ernst, Attorneys of New York, who informed me that at a creditors' meeting held in New York at a previous date, a Creditors' Committee had been appointed and that it was the intention or purpose of the creditors to give the R. A. Pilcher Company an extension of time in which to refinance the business and make some definite settlement with the creditors.

In this connection I received a telegram from Mr. Pilcher informing me that since I was known personally or by reputation to a large majority of the creditors that I was their unanimous choice as Receiver and Mr. Pilcher urged me to accept the appointment.

Further in this connection I received a telephone call from Mr. Walton N. Moore of San Francisco, who informed me that he had been in communication with some member of the newly appointed Creditors' Committee and Mr. Moore strongly urged me to accept the appointment as Receiver.

Mr. Moore further informed me that he had been elected a member of the Creditors' Committee and

that while he knew very little about the circumstances and conditions surrounding the R. A. Pilcher Company he felt that he would receive further and more enlightening information at any time and requested that I come to San Francisco to confer with him immediately in regard [555] to the procedure to be followed. I complied with this request and spent possibly an hour or an hour and a half discussing matters in connection with this business with Mr. Moore. Up to this time neither Mr. Moore nor myself had received further information from New York and it was agreed between us that I should see him at his home in Piedmont that evening after dinner to discuss the matter further, it being felt by both him and myself that either of us might, before the afternoon was gone, receive some communication from New York that would give us further information in regard to this business.

As arranged, I called upon Mr. Moore at his home in Piedmont and we discussed the business further. However, much of the evening was taken up by Mr. Moore explaining to me that the San Francisco Board of Trade is the recognized agency on the Pacific Coast for the handling of bankrupt merchandising estates, and that since in his opinion it was only a question of time until this business would have to be liquidated and a distribution of the proceeds of the sale of the assets made to the creditors, that it should be handled through the San Francisco Board of Trade. He gave as a rea-

son for this that the San Francisco Board of Trade is owned and controlled by the wholesale and manufacturing interests of San Francisco and that as a great number of its members were creditors of the R. A. Pilcher Company, it was only fair and right that their organization should handle this business. Mr. Moore stated further that they had the machinery, the personnel, the intelligence and the experience necessary to the handling of affairs of this kind and insisted that I go into camp with them, employ their Attorneys, accountants and make use of their equipment generally in the conduct of this business.

I did not accede to Mr. Moore's demands but informed him that I would think the matter over carefully and [556] give him my decision at a later date. After thinking the matter over carefully and taking into consideration the fact that I was the choice for Receiver of the creditors who attended the meeting at the inception of the receivership, I felt that it was my duty to handle this business in the manner in which I felt the best results could be obtained. I also felt that if it had been the desire of the creditors to have the San Francisco Board of Trade handle the matter they would have selected them as Receiver instead of selecting me. Then too, there were other Boards of Trade or Credit Men's Association located in other Cities, whose members were creditors and whom I felt that I would discriminate against in employing the San Francisco Board of Trade and I also felt that since it was the purpose and plan of the

stockholders, as I was advised by Mr. Pilcher, to refinance the business and make a settlement with the creditors, that the interests of both the stockholders and the creditors would best be served by my keeping the business of the receivership separate and apart and thus avoid further complications.

EMPLOYMENT OF ATTORNEY.

On the morning of June 4, 1926, I again conferred with Mr. Edward R. Eliassen and again went over with him the duties of a Receiver, the complications that might arise and how in his opinion the interests of both the creditors and stockholders could best be served. After this conference I was convinced that I would make no mistake in employing my own Attorney, establishing an office in Oakland for the purpose of carrying on the business of this receivership. Acting upon this conviction I immediately employed Mr. Edward R. Eliassen of Oakland, as Attorney for the Receivers in the Districts of California, Oregon and Washington and we immediately set about making plans for the work at hand. Mr. Eliassen assisted and [557] advised me in drafting numerous telegrams, provided me with the services of his office and stenographer and extended to me many courtesies and accomodations which were urgently needed at that time and which I highly appreciated.

ESTABLISHING OF CENTRAL OFFICE.

I immediately got in touch with the Superintendent of the Central Bank Building, 14th and Broad-

way, in the City of Oakland, and rented from him a suite of offices consisting of two small rooms located on the same floor and adjacent to the offices of Mr. Eliassen, Attorney for the Receivers. This has proven a source of convenience, as well as an instrument of economy in the conduct of the business, as it later developed, that in the handling of this business it has been necessary for me to confer with Mr. Eliassen many times daily in regard to matters pertaining to the administration of the business of the Receivers. For this office I have expended the sum of Ninety Dollars and Fifty Cents per month, which is the same rate at which the office could be obtained under a lease contract covering a period of years. I have taken no lease, but have had the use of the office on a month to month basis.

In order to keep down the expenses I equipped this office with two ordinary office tables, a typewriter desk, an ordinary filing cabinet and a few chairs. This equipment I attempted to rent, but found if the receivership lasted over a period of four or five months that I would pay out more in rental than the equipment would cost of bought outright, so I purchased this equipment and when the receivership is closed the estate will be credited with the proceeds from the sale of such equipment. Throughout the term of this receivership I have without charge, furnished my own typewriter and also my own desk, together with other incidental office equipment which I personally owned at the beginning of the receivership. For the purpose of figuring inventories [558] and the carrying on

of other work in connection with the receivership where office machinery was indicated and indispensable we have borrowed or rented such equipment at a nominal cost.

PURPOSE OF RECEIVERSHIP.

Some few days after the inception of the receivership, and after a conference with Mr. Walton N. Moore, and after the employment of Mr. Eliassen as Attorney, I received a lengthy letter from McManus, Ernst & Ernst of New York, Attorneys, who informed me in reply to my inquiry that they were Attorneys for both the complainants and the Receivers and that they had attended the meeting of the creditors held in New York prior to the inception of the receivership, and informing me that the purpose of this receivership was to conduct the business in an orderly manner under the direction of a Receiver until such time as the creditors and the stockholders could formulate some plan for the refinancing of the business and for a settlement with the creditors. They informed me further that it was the purpose of the creditors to give the Company an extension of time in which to accomplish the refinancing of the business and the making of a settlement with the creditors.

They also informed me that they had prepared and mailed to each creditor an agreement to be signed by them which would allow the Company an extension of time without interference and that during this period the business would be carried on under my direction and that I would have the

advantage of having at my disposal the support and helpful suggestions from the newly instituted Creditors' Committee.

I was further informed that Mr. A. F. Gotthold of New York had also been appointed my Co-receiver and that while control should be joint, that Mr. Gotthold would not interfere with my control in the West and would leave the direction of the business of the Receivers in the West solely to me. [559]

I was further informed that numerous suits were filed and numerous attachments being levied against the *pro-* property and that the store managers were greatly alarmed and appealing to the Pilcher Company's office in New York and also to McManus, Ernst & Ernst and the New York Receiver for aid and advice in the handling and disposition of these matters. I was instructed by McManus, Ernst & Ernst to immediately communicate with the store managers and take whatever steps were necessary to passify restless creditors and to do whatever was necessary to prevent the instituting of further suits and the filing of further attachments.

EMPLOYMENT OF ACCOUNTANTS.

Immediately after conferring with Mr. Eliassen on the morning of June 5, 1926, and after renting an office, I employed Philip A. Hershey & Company as accountants for the Receivers and instructed them to keep accurate and complete record of all transactions in connection with the business

of the stores and in the general conduct of the receivership.

Mr. Philip A. Hershey immediately took charge of the accounting and proceeded to make plans for the keeping of accurate records of all accounts in connection with the business.

After communicating with the stores and instructing them in their duties under the receivership, daily reports from the stores, giving in detail the results of their daily business, their sales, expenditures and so forth began to arrive at the office in Oakland. The accountants employed, planned and procured the necessary books and equipment for the posting and keeping of these records from day to day for compiling of statements from time to time as they were required by me in the conduct and administration of the business. This work involved the keeping of accounts and records for the sixteen stores, together with the records that were necessary to keep with reference to transactions [560] with wholesale houses and manufacturers, as well as accounts and so forth that had developed with various creditors who had filed claims and attachments and who had succeeded in tying up funds in local banks where such funds were located.

The work of the accountants involved the expenditure of a great deal of time and effort and their work has been creditably done. Throughout the first five months of the Receivership the accountants have supplied a comprehensive, detailed monthly report of all transactions in connection with the business and have from time to time sup-

plied me with additional statements and figures which were indispensable in the conduct of the business. Without these reports and without this splendid and always available service I should have been at a loss many times to know the condition of a certain store, the manager of which would want to place an order for additional merchandise, or make some expenditure, or do something in connection with the business that could not have been intelligently passed upon by me without having at hand these figures portraying the condition of that particular store. These were almost daily occurrences.

During my absence from the office at various times in the interest of the business, that is when I might have to be in court in the jurisdictions of Oregon and Washington, Mr. Hershey aided me materially in directing the activities of the store managers, my having communicated to him and he having quickly grasped the plan I had formulated for the conduct of the business and the course I proposed to pursue.

COMMUNICATED WITH AND TOOK CHARGE OF THE STORES.

After receiving information from McManus, Ernst & Ernst to the effect that I was to take charge of the stores and conduct the business of the Receivers on the Coast, I immediately communicated with the store managers, [561] notifying them that I had been appointed Receiver for the R. A. Pilcher Company and directed them to keep their stores

open, promote their sales and otherwise carry on their business as usual until such time as I could formulate plans for the continuing of the business under the receivership, at which time I would give them further instructions in this regard.

I also instructed them to remit to me daily the cash received from the sale of merchandise and also to send to me each day a detailed report showing the amount of their daily sales, their expenditures for local operating expenses, showing their bank balances and so forth.

I also informed them that the business would in the future be directed from the office established in Oakland and directed them to refrain from the placing of any orders for merchandise until they received further notice from me.

I informed them further that in the future the accounts and records of the Company would be kept in the office established in Oakland and that they should communicate with me in regard to everything pertaining to the conduct of their stores. I instructed them as to how to deal with obstreperous local creditors and how to passify them and if necessary placate creditors who threatened suit or attachment or who otherwise annoyed them with their claims against the Company.

Having known a few of these store managers personally and they all having known me personally or by reputation, I received from most all of them communications to the effect that they were happy that the business had fallen into my hands and assuring me of their support and co-operation.

ANCILLARY PROCEEDINGS.

The various conferences had with Mr. Eliassen, Attorney for the Receivers, revealed to me the fact that in order to obtain jurisdiction in the Districts of [562] California, Oregon and Washington it would be necessary to institute Ancillary proceedings in the Federal Courts of these Districts and to obtain if possible the appointment of myself and Mr. Gotthold Receivers in these various jurisdictions.

Mr. Eliassen prepared the necessary papers and together we appeared before A. F. St. Sure, Judge of the Federal Court, Northern District of California, and obtained on June 9th a Court order appointing Mr. Gotthold and myself temporary Receivers in the Northern District of California.

Immediately thereafter Mr. Eliassen and I proceeded to Portland, Oregon, where we appeared in the United States Court, instituted Ancillary proceedings and from Robert S. Bean, Judge of the Federal Court of Oregon, obtained on June 14th an order appointing Mr. Gotthold and myself Receivers in that jurisdiction.

Immediately thereafter we proceeded to Seattle, Washington, where we appeared in the United States Court, instituted Ancillary proceedings and from Jeremiah Neterer, Judge of the Federal Court, for the Western District of Washington, obtained on June 15th an order appointing Mr. Gotthold and myself temporary Receivers.

Immediately thereafter we proceeded to Spokane, Washington, instituted Ancillary proceedings

in the Federal Court and from Stanley Webster, presiding Judge of the Federal Court in the Eastern District of Washington, obtained on June 16th an order appointing Mr. Gotthold and myself temporary Receivers.

BONDS.

At the time Ancillary proceedings were instituted in the jurisdiction of California, Oregon and Washington, the bonds of the Receivers were fixed by the Courts as follows: in the District of California [563] The Receivers were required to file a bond of Ten Thousand Dollars each. Similar sums were required in the District of Oregon and the Districts of Eastern and Western Washington. These bonds were filed and are still in effect. In October, at the time the stores were sold, a considerable sum of money came into the hands of the Receivers and Judge Neterer of Seattle, Washington, imposed the filing of an additional bond by me in the sum of Eighty Thousand Dollars. This bond is also still in effect.

INTERVIEWING OF CREDITORS.

Shortly after the inception of the receivership and after notice of my appointment had been received by the creditors of the R. A. Pilcher Company, I began to receive telephone calls and personal calls from various San Francisco creditors and communications by letter and telegram from various creditors scattered throughout the United States. Some were interested to know what condition the R. A. Pilcher Company was in finan-

cially, others were interested in delivering merchandise that had been purchased by the buyers of the R. A. Pilcher Company previous to the receivership, others were interested to know what, if anything, they would get out of their claims and some were apparently just curious. This of course took up considerable of my time. However, they were creditors, their interests were material and they were entitled to any information or consideration I could give them and it was my duty to hear what they had to say, give them whatever help I could and make prompt and intelligent replies to their written communications.

While I was in Portland, Seattle and Spokane in the matter of the Ancillary proceedings, many creditors located in those Districts, having learned through their Boards of Trade, with whom I communicated and had conferences, that I was in town sought me out and kept me busy far into the night going over the situation with them and discussing the business generally. [564] While in Portland, Mr. Eliassen and I called at the office of the Credit Men's Association where we interviewed a number of creditors and discussed the condition of the business generally and where we gave them what information was then at hand regarding the receivership, the condition of the business and the general plan for carrying on of the business under the receivership as far as we had, up to that time, been able to make any plans.

At Seattle we interviewed Mr. A. V. Love, member of the Creditors' Committee and who requested

that we accompany him to the offices of the Business Men's Association, where we met a number of creditors of the R. A. Pilcher Company. We gave them the benefit of our limited knowledge of the condition of the business and after having discussed with them the condition of the business and the purpose of the receivership we received from them a vote of confidence and their hearty approval of our procedure and our plans as far as they had gone.

At Spokane we had a meeting with the Credit Men's Association and after going over the situation with them, learned that they were in accord with our procedure and plans and offered any assistance they could give in the handling of the business.

MEETING WITH THE STORE MANAGERS.

After the business in connection with the Ancillary proceedings was finished in Spokane I returned to Portland on June 17th for the purpose of holding a conference with all of the managers of the R. A. Pilcher Company's stores located in the States of Oregon and Washington. Three or four days previous to this meeting I had notified the managers of the stores in Oregon and Washington that I would be in Portland on June 17th for the purpose of conferring with them and instructed them to meet me there on the morning of that date. At about ten o'clock in the morning this meeting was called to order [565] and I immediately in-

formed the store managers of the purpose of the meeting.

PURPOSE OF THE MEETING.

This meeting was called for the purpose of instructing the store managers in their duties and the future conduct of the business under the receivership, and learning from them first hand, the condition of their stocks and the possibilities of their stores, instructing them in the keeping of their records their daily reports, advertising, placing orders for new merchandise, sales policies, banking, keeping down of their expenses, reducing their help, disposing of surplus stock, dealing with obstreperous creditors, dealing with their landlords and other matters pertaining to the business.

CONDITION OF THE STOCKS.

After consulting with the managers of each individual store I discovered that their stocks were out of balance, that they had a surplus of merchandise in some lines and that their stock of merchandise in other lines were more or less depleted. I also learned from the store managers that they were not responsible for this condition. They were unanimous in their assertion that the buyers employed in New York by the R. A. Pilcher Company had without request of the managers or even with their consent shipped to them quantities of merchandise which they had not ordered and which they could not use to advantage. In many instances this merchandise was not adapted to their particular locality and they were experiencing considerable

difficulty in disposing of it at any price, much less being able to dispose of it at a *ligament* profit.

I learned from the store managers that their stocks of ladies ready to year consisting of coats, dresses and kindred lines were exceptionally heavy. The greater part of this stock had been bought for the Spring season just past and that they were experiencing difficulty in moving it at this time [566] of the year. This complaint was justified because the element of style and the season in which this merchandise could be sold played an important part in its value and in their ability to dispose of it.

In addition I discovered that much of the ready to wear, that is the dresses, were too elaborately styled and the price at which they should be sold was entirely too high for the majority of the stores which were located in Country towns. This condition also existed in their shoe department. However, not to the same extent as in their ready to wear department.

I learned further from the managers that some of their locations were fairly good and some were poor. I also discovered from the amount of business that some of these stores were doing, that the rooms they occupied were entirely too large for a store of this character and for the amount of business they were doing or could hope to do and as a result the fixed overhead expense of such stores as were in this predicament was so great that there was little likelihood of increasing their business sufficient to overcome this handicap and build a profitable business.

I also learned from them that their stores, in most instances, had been well received by the people in their respective communities. However, a considerable part of their merchandise was too high priced for the majority of the people to consume and that the minority who were able to buy this high priced merchandise were difficult to reach and interest and that as a result they found themselves unable to dispose of this high priced merchandise in sufficient quantities to warrant its being stocked in stores of this character. As a result this high priced merchandise was not moving and the capital thus invested was for all practical purposes frozen and materially interfered [567] with the turnover in sales the stores should have had, consequently, reducing the profit that should have been obtained on the investment.

ADVERTISING.

The question of advertising was carefully gone into and the requirements of each individual store were carefully gone into with the manager. I learned from the store managers that in most towns where the stores are located their printers had unpaid accounts against the R. A. Pilcher Company at the time the business went into the hands of the Receivers and that it was the general attitude of the proprietors of the newspapers and other advertising mediums to decline to accept further business from these stores until these past due bills were paid. I instructed the store managers to call upon their printers personally and explain to them that it was no fault of their's that these stores had gone

into the hands of Receivers, and no fault of their's that they had been caught with unpaid advertising bills, as such bills would have been paid when the services were rendered had the printer presented his bill and that these bills would never have been contracted had the store manager known in advance that the R. A. Pilcher Company was in a bad way financially. They were also informed that there was little likelihood of anything happening to prevent the orderly conduct of the business in the future.

They were further instructed to inform their printers that any bills contracted for advertising under the Receivership would be paid by the Receivers and upon my arrival home I confirmed this by letters addressed to those printers who wanted this assurance from me. As a result the printers continued to take advertising which materially assisted us in the future conduct of the business.

DAILY REPORTS.

At this meeting all store managers were instructed regarding the making out of [568] their daily reports and were instructed to use prepared daily report blanks for this purpose. They were instructed to record in the proper column on this report their daily sales and in another column prepared for the purpose to report their local expenditures which included freight, express, light, water, heat, power, stamps, drayage, cartage, disposal of waste, salaries to employees and other minor expenditures for local supplies as sweeping

compounds, brooms, repairs to lighting and plumbing equipment and so forth. Most of these items were paid for by check on their local banks where they kept a small deposit for that purpose. However, these cancelled vouchers together with their bank statements were subject to withdrawal only by myself and were collected at the general office in Oakland for the purpose of checking up the daily reports and the completing of the records and accounts of the Receivers in the office at Oakland.

The managers of all stores were further instructed to retain in their cash drawer Two Hundred Dollars as a revolving fund for change and to deposit their daily sales in their local banks to the account of R. A. Pilcher Company—A. F. Lieurance Co-Receiver, and to send each day to me at my office at Oakland a draft for the full amount of each days sale less the local daily expenditures, all of which were accounted for on the daily reports.

BUYING MERCHANDISE.

Managers were instructed that the promiscuous placing of orders for new merchandise had ceased and that in the future as it became necessary to supply new merchandise to any store that I would do the buying and that such orders would be received by me at the Oakland office in the form of a requisition and that no order for merchandise would be placed for any store without my first having gone over it and without the stamp of confirmation of the Receivers and my signature appearing thereon.

This practice was strictly adhered [569] to except in some instances where it was necessary to obtain merchandise quickly and confirmation was given by telegram. As a result of this precaution and procedure the buying of merchandise for these stores was confined to the minimum and in most instances orders were placed only for staple merchandise which kept stocks in balance and aided materially in the reducing of surplus stocks in other lines which we were exceedingly anxious to dispose of.

SALES POLICIES.

As the stocks of merchandise contained in most stores were exceptionally heavy and as these stores consisted in part of seasonable merchandise it was imperative that some drastic or effective measures be immediately adopted to promote sales so that this unseasonable merchandise might be disposed of quickly. Knowing that this is most effectively accomplished by excitement, I instructed the store managers in sale tactics, which they were to employ in the future to create the necessary excitement, enthusiasm and interest that would move this merchandise, and as a result of this effort on the part of myself and the store managers, we succeeded in converting into cash Two Hundred and Twenty-five Thousand Dollars worth of surplus stock, almost one half of which was obtained through the sale of ladies ready to wear and other seasonable goods that were depreciating in value each day as the season advanced.

EXPENSES.

After going over with the store managers the amount of rent they were paying, the amount of help they were employing and the expenses incident to the daily conduct of their business I learned that the fixed overhead of each and every store was excessive compared with the volume of business they were doing and after a careful analysis of the expenses of each and every store I discovered that the only hope of reducing these expenses [570] was in reducing the amount of help employed in the stores and the curtailing of all other expenses incident to the operation of the stores.

It was apparent that the store managers had not been in the habit of anticipating their wants or needs and using the mails three or four of five days in advance of the time they wanted certain communications to arrive at certain destinations, but to the contrary they had waited until the last minute and instead of writing were in the habit of using telegrams, which resulted in their expending considerable money in this direction. They were instructed to desist from the use of the telegraph except in cases of emergency and to carry on their correspondence by letter both with the general office in Oakland and with other people with whom they had occasion to correspond.

They were instructed to reduce their help to the minimum and as a result their monthly expenditures were reduced by some Eighteen Hundred Dollars. They were also instructed to be careful

and saving in the use of supplies and equipment and to curtail as much as possible such expenses as were not definitely fixed and over which they had control. It must of course be understood, that their store rentals, their lights, water, heat and so forth were on a fixed basis and no saving could be made in these items.

INVENTORY.

All store managers were informed that within a short time a complete physical inventory of their stock would be taken and that such inventory would have to be accurate and that they would have to make affidavit to its correctness before a Notary Public.

They were instructed upon their return home to immediately set about putting their stock in order that the [571] taking of this inventory might be facilitated and that the task might be completed within the shortest possible time. They were informed that they would receive from me inventory blanks for *for* purpose of taking this inventory and that each and every sheet would have to bear the signature of the person who made the count and who priced the merchandise. They were also instructed to take all merchandise at its original cost, regardless of its condition or the season in which it was bought. As a result of this instruction and precaution we obtained an inventory in record time and it was received at the Oakland office in such condition that the extensions and computations were made without difficulty and with dis-

patch. The inventory gave both the cost and retail prices, thus providing the means for determining the average mark up on the merchandise.

INSURANCE.

Not having received from New York any information in regard to the status of the insurance or the amount being carried by the individual stores, it was important that this matter be taken up with the store managers to ascertain from them the amount of insurance they were carrying, how long it had been in force, when it would expire and so forth. As a result of taking this matter up with the store managers it developed that the insurance covering some of the stores had been placed in New York, while the insurance covering other stores had been placed locally. Hence, the status of the insurance covering all the stores at that time could not be definitely determined. As a result all store managers were instructed to place a binder insurance policy upon the stocks of the individual stores to the amount of approximately ninety per cent of the estimated value of their respective stocks. In some instances it was necessary to place only an additional amount of insurance, while in other instances where the manager knew nothing of the condition [572] of the insurance covering that particular store, it was necessary for him to place insurance locally to the amount of approximately ninety per cent of his stock until such time as I could get together all of the insurance policies and revise the insurance covering all of the stores.

TAXES.

In conferring with the store managers on this subject I learned that taxes then due in some localities had not been paid and that the store managers had received notice that unless payment was made forthwith the account would be put in the hands of the Sheriff for collection. The store managers were instructed to send these notices to my office at Oakland, California, where they received the proper attention.

CLAIMS AND ATTACHMENTS.

Upon discussing this subject with the store managers I learned that numerous small creditors in the towns where the stores were located were becoming restless and that numerous suits and attachments had been filed or threatened. I learned that there were cases where the alterations were being made to store buildings occupied by the R. A. Pilcher Company and where the work was being done by contract for either the landlord or the R. A. Pilcher Company, that liens had been filed or were threatened and that on the whole there was quite a lot of dissatisfaction because of the report having been circulated that the R. A. Pilcher Company was in financial difficulty, and that such creditors would have *difficult* in collecting for their services. The store managers were instructed upon their return home to make it a point to interview each of these creditors personally, explain to them that the business was now in the hands of Receivers and that it was the purpose and plan of the R. A. Pilcher Com-

pany to refinance its business and if possible pay each and every creditor in full. However, in as much as the business was now already [573] in the hands of the Receivers that there was nothing to be gained by these restless creditors insisting upon an immediate settlement and that if they would be patient we would in a short time have worked out some sort of a plan whereby a settlement could be made with all creditors and in the event this could not be done that they would have equal opportunity along with all other creditors to file their claims against the estate and in the end would receive equal and fair treatment along with all other creditors. With this explanation the restless creditors were passified for the time being and as soon as possible I communicated with each of them by letter explaining the situation and as a result we received their co-operation and helpful support instead of their opposition.

MORALE AND CO-OPERATION.

Last but not least, the calling together of the store managers at Portland, Oregon, on this occasion for a conference and for a meeting to discuss in general the affairs of the R. A. Pilcher Company, was not solely for the purpose of instructing them in their duties and in the future conduct of the stores under the receivership. When they arrived in Portland and we assembled in a room in the Portland Hotel, they were a rather dejected, discouraged looking lot of men. As a matter of fact, some of them told me that they supposed that when we went into that

meeting that they were to be told that their services would no longer be needed and that it would be up to them to look for a new position.

It requires no stretching of the imagination to understand and appreciate the feelings of these men and the difficulties under which they were laboring. Some of them had just recently taken charge of their stores and had been put to considerable expenses moving and in some instances buying new furniture and other equipment for the purpose of fitting out a home, feeling that they were permanently located. Then like a thunder clap out of a [574] clear sky they receive notice that the Company is in financial difficulty and they realize their positions are in danger and that the chances are they will have to make another move and another business connection.

It is immediately apparent that under these circumstances the morale of this organization had fallen far below par. As a matter of fact, all of these men, were, at the time this meeting was called, making an effort to secure another position before this business should collapse entirely and leave them without employment. Realizing the frame of mind these men were in and appreciating to some extent their feelings and what they were contemplating, I brought up the subject of what the future had in store and what they might in the normal course of events expect. They were informed that as yet no one knew definitely and accurately the financial condition of the R. A. Pilcher Company. Neither did we know at that time whether or not the stock-

holders would be successful in their efforts to refinance the business, nor did we know whether or not the creditors would be content to wait and work with the stockholders in reorganizing the business, or whether they would demand immediate liquidation and distribution of the proceeds of the sale of the property. It was pointed out to the store managers that there was no need for immediate action on their part in so far as securing new positions was concerned. They had cast their lot with the R. A. Pilcher Company, had made some sacrifice in order to make this connection and that if it was possible for the stockholders to refinance the business they would be in a strategic position. If on the other hand, it was found later on that the business would not be refinanced, that it would then be time for them to seek employment elsewhere. However, it was explained to them that for the present they had nothing more to lose, that they could be assured of my support and co-operation and my every effort to take care of them [575] in so far as it was possible for me to do so, and that by sticking together we might be able to accomplish a great deal and that by falling apart none of us would be able to do very much of anything. The result was that the morale of the store managers, with one exception, was restored to par and they pledged to me their loyal support and co-operation and faithfully promised to do everything they could to promote the business under my direction and see the work through to a finish.

Chain stores cannot be run without an organization, neither can chain stores be run without managers. It would have been bordering on commercial suicide to have allowed those store managers, who were familiar with the business, who knew the stocks and who knew the community in which the stores were located, to leave the employment of the Company at this critical period. After appealing to their better judgment they were prevailed upon to remain with the organization, with no advance in salary, until the stocks were reduced and the stores sold. Without exception, they were, I believe, a loyal and honorable lot of men. I also believe that they gave the best they had according to their ability. Without them and without their loyal support and co-operation I could never have accomplished the results obtained in this administration.

RETURN TO OAKLAND.

After completing the work connected with the instituting of Ancillary proceedings in the Districts of Oregon and Washington and after having conferred with the store managers at Portland, Oregon, I returned immediately to my office in Oakland and began the task of formulating definite plans for the continued operation of the stores; for the taking of a physical inventory of the stocks and for determining the amount of indebtedness against the Pilcher Company and the general condition [576] of the business.

On or about June 25th, I received a telegram from New York stating that Mr. Walter E. Ernst of Mc-

Manus, Ernst & Ernst, was on his way to the Pacific Coast and was coming to Oakland for the purpose of going over with me various matters in connection with the business of the Receivers of the R. A. Pilcher Company. Upon Mr. Ernst's arrival in Oakland, I learned that he was accompanied by Mr. Frank J. Sullivan, one of the stockholders of the R. A. Pilcher Company, who had come to interview me partly on his own account but largely on behalf of Mr. J. C. Brownstone of New York, the principal stockholder in the R. A. Pilcher Company. After going over the situation with Mr. Ernst and Mr. Sullivan I gained considerable knowledge of the condition of the business prior to the inception of the receivership and also learned from them that Mr. Pilcher was then supposed to be in Oakland to work with me in the handling of the stores and the general conduct of the business, while both he and Mr. Brownstone were trying to refinance the business and devise some plan whereby they could make some satisfactory settlement with the creditors. As a matter of fact, both Mr. Ernst and Mr. Sullivan were surprised that Mr. Pilcher had not arrived in Oakland some days prior to their arrival. However, while Mr. Ernst and Mr. Sullivan were here Mr. Pilcher arrived and together we had numerous long conferences regarding the condition of the business and what steps to take in order to carry out the plan as outlined and agreed upon at the Creditors' meeting just prior to the inception of the receivership. Mr. Pilcher informed us that he was making a strenuous effort to obtain funds

with which to refinance the business. However, up to that time he had met with no success and we all felt that there was little li*kl*ihood of his being able to raise the necessary funds.

While Mr. Ernst was here it was agreed and [577] understood that Mr. Gotthold, the Receiver in New York, would look after the business in that jurisdiction and that the sole handling of the business of the Receivers in the jurisdictions of California, Oregon and Washington would be left entirely to me. Mr. Ernst stated that when he left New York it was understood that a report was to be made to the Court as quickly as possible and that in order to make such a report it would be necessary to know definitely the aggregate amount of the assets located in Oregon, Washington and California, which consisted largely of stocks of merchandise together with what cash had been accumulated from the sale of merchandise. For the purpose of obtaining this information the work of taking the inventory, as well as its extension and computation, was carried on both day and night in the stores and in the office here in Oakland for the purpose of completing it as quickly as possible so that the information to be obtained might be incorporated in the report to be made to the various Courts. Mr. Ernst was here some five or six days and during that time we were in daily conference and at the completion of the inventory a telegram containing the information necessary to the making of a report for presentation to the Court, was drafted and sent to the office of McManus, Ernst &

Ernst in New York. This telegram contained information regarding the amount of the assets, also information pertaining to the condition and possibilities of the business, all of which was based upon the meager knowledge we had been able to gain of the business up to that time.

Upon communicating this information to New York it was decided that the receivership should be made permanent. This step was first taken in New York and immediately thereafter Mr. Eliassen and I appeared before the Courts in the Ancillary jurisdictions and succeeded in having the receivership made permanent in all jurisdictions. [578]

SUITS AND ATTACHMENTS.

Prior to the inception of the receivership suits and attachments had been filed against the R. A. Pilcher Company in the District of California and as a result of these suits, cash funds belonging to the Company had been tied up in the banks at Stockton and Turlock, California. These creditors having been enjoined by Court order from further prosecuting their suits were amenable to reason and suggestion and as a result I was, through my Attorney, Mr. Eliassen, able to make settlements with them on a satisfactory basis.

Following the making of the receivership permanent and following completion of the plans for the conducting of the stores and for the future handling of the general business of the receivership, I gave my time and attention to the merchandising of the stores and to the task of passifying creditors, to the

buying of merchandise for the purpose of replenishing depleted stocks in the stores, going over the inventories, analyzing store reports, and instructing the store managers in the daily conduct of the business.

GENERAL INVENTORIES.

In taking the inventories of the stores, all merchandise contained therein was listed in the inventories at cost and the amount of merchandise found to be on hand was $599,717.72. This figure, however, is misleading as to the actual value as there was contained in these stores approximately $100,000.00 ladies ready to wear and kindred lines, the value of which was materially affected by the element of style and the season in which this merchandise could be sold, the ready to wear having been bought for the Spring season just past. In addition there was approximately $10,000.00 worth of cheap jewelry which was inventoried at cost, the value of which was very questionable. In addition the stocks contained approximately $20,000.00 worth of men's overcoats, which were purchased as a job lot and [579] which could not be disposed of to advantage at this time of the year. Hence, the purchase price was an extremely high figure at which to take these coats into an inventory to determine value. In taking these inventories, both the cost price of the merchandise and the price at which the merchandise was marked to retail were listed on the inventories and the quantities contained in the inventories were extended and

computed at both the cost price and the retail price, thus providing the means to determine the average mark up or gross profit the stores were obtaining on their retail sales. This information was valuable and indispensable in determining what might be expected of the stores in the future and whether or not they could in the future be operated at a fair profit.

After the inventory of each individual store had been analyzed and the aggregate amount of assets known, I was in a position to make a statement or give an opinion as to the future possibilities of the business.

Mr. Pilcher remained in Oakland only a short time. However, I heard from him occasionally and on these occasions gave him what information I could regarding the stock and the possibilities of the stores that he might have this information to use in making an effort to raise money to refinance and repossess the stores. I also communicated with Mr. Brownstone in this regard, both by letter and by telegram and also from time to time communicated such information as I had gained and such conclusions as I had arrived at to McManus, Ernst & Ernst and to my Co-receiver, Mr. A. F. Gotthold. This work was necessary and of much importance, as it was the plan, as I was informed, between the stockholders and the creditors, that the business be run for a period of time to determine its possibilities and give the stockholders an opportunity to familiarize themselves with the condition of the business and its possibilities, all of

which would aid them in refinancing and making a satisfactory settlement with the creditors. [580]

VISIT TO THE STORES.

After having completed plans for the running of the stores, and after having supplied the necessary merchandise and having attended to other details in connection with the business, I made a trip through California, Oregon and Washington, for the purpose of visiting each and every store. Up to this time, my time had been taken up both night and day in the performance of my duties in connection with the business, and this was the first opportunity I had to get away long enough to visit each of the stores and see for myself just what the general situation was in each of the towns where the stores were located. While visiting these stores I went through their stocks carefully, making an estimated inventory of both the stocks and the fixtures, sizing up the location, the personnel of the stores, examining their expense accounts, instructing the manager further in the carrying on of the business and making changes in their help and attending to other necessary details in connection with the business. These stores were scattered over Northern California, Oregon and Eastern and Western Washington. As they were so widely distributed over this vast territory, it required considerable time to visit each one of them and to do the amount of work necessary to be done in each in order to familiarize myself with the stock and the general conditions surrounding the stores and the numerous details involved in this work.

This visit to the stores was absolutely necessary as it gave me a much better working knowledge of the stores, gave me a better line on the managers and enabled me to carry on my work in directing their activities to a much better advantage. Later on the information gained by this visit to the stores was of considerable value as I was in position to give prospective purchasers accurate, authentic and comprehensive information that I could not have given had I had made this personal visit to the stores. This was reflected in the price obtained for the stores when they were [581] finally sold.

Having made this visit to each store I was familiar with the location, the general appearance of the store, the stock, and was thus able to buy stock more intelligently and keep the stores in a more presentable and up to date condition, while they were being inspected by prospective buyers.

BULLETINS.

Because of the stores being so widely separated and scattered over such a vast territory, it was of course impossible for me to come in contact with them frequently or come in contact with the store managers. Hence, it was necessary to keep in daily touch with them by correspondence. In this connection, bulletins were issued from time to time, directing the store managers in their duties in regard to the conduct of the business. In addition to this, I was in daily communication with the store managers by letter and sometimes by telegram or telephone. Through these instruments I

maintained contact and succeeded in carrying on the business satisfactorily.

INTERVIEWING MR. PILCHER AND MR. BROWNSTONE.

At the request of Mr. J. C. Brownstone, principal stockholder of the R. A. Pilcher Company, I met him by appointment in Yellowstone Park, Wyoming, the latter part of July, 1926, for the purpose of going over with him the condition of the stocks, the future possibilities of the stores and the refinancing of the business. I spent two days with Mr. Brownstone, all of which time was taken up in discussing the business. After informing Mr. Brownstone regarding the condition of the stocks and after going over the possibilities of the stores with him, I gathered from his conversation and his general attitude that he would not be interested in helping to refinance the business under its former management and as he did not have anyone in mind whom he felt could manage the business successfully, he felt it would be a waste of both effort and money for the original stockholders to try and raise sufficient [582] funds to refinance and repossess the stores and make a settlement with the creditors. As a matter of fact, since the creditors numbered six hundred and forty-seven, there was little likelihood that they could all be prevailed upon to come into a plan that would facilitate the working out of the refinancing and continuing of the stores.

After leaving Mr. Brownstone, I returned to Oregon, where I met Mr. Pilcher by appointment at the Pilcher Company's store in Albany. I

learned from Mr. Pilcher that he had been unsuccessful in his efforts to raise funds for the refinancing of the business. However, he told me that he had interested a number of people and that they were seriously considering letting him have the necessary money with which to repossess the stores. At this conference I informed Mr. Pilcher that the stores had been running under the direction of the Receivers for a period of two months and that there was no possibility of their working out of their present predicament unless some satisfactory arrangement could be made with the creditors and additional money raised with which to refinance the stores. I also informed Mr. Pilcher that since he was the man at the head of this business it was up to him to make overtures to the creditors and to perfect plans for the putting the business in such condition as would warrant the retirement of the Receivers and the future carrying on of the business under the direction of the Company.

Mr. Pilcher insisted that he felt sure that he would be successful in raising the necessary funds with which to make settlement with the creditors and repossess the business and requested that before I did anything toward disposing of the property, that he be given some more time in which to complete his present plans and raise the necessary money. I informed Mr. Pilcher regarding the condition of the stocks and the possibilities of the stores as I saw them and told him that I would be willing to carry on the [583] business indefinitely providing he was making any definite

progress toward the refinancing and repossessing of the business. At this time I told Mr. Pilcher that I would carry on the business under the receivership for two or three weeks, at the end of which time, he would have to have the money with which to refinance the business and would have then to begin negotiations with the creditors, otherwise I would feel it incumbent upon me, in the interests of the creditors and the stockholders as well, to apply to the Courts for an order to sell the property.

On or about October 1st, I got in touch with Mr. Pilcher, succeeded in getting him into my office in Oakland, where I told him plainly that he had three months in which to refinance and repossess the business and up to this time he had met with no success and after learning from him some of the sources from which he hoped to secure these funds, I was convinced that it was only a waste of time to wait any longer.

Immediately after this interview with Mr. Pilcher I instructed Mr. Eliassen to prepare the necessary papers for the obtaining of an order from the Courts permitting me to sell the property. These orders were obtained immediately and notice of sale was published in various newspapers and Trade Journals throughout the Country and as soon thereafter as the conditions would permit, the stores were sold and delivered, all of which was consummated between October 25th and November 3rd.

SELLING THE PROPERTY.

The selling of sixteen individual stores scattered through three States, may at first thought, seem a simple problem. However, the performing of this task is a big undertaking especially when negotiations with prospective buyers must of necessity be carried on in the main by correspondence. In order to carry on this work effectively and obtain satisfactory results it was necessary to keep these stores in operation throughout the time the advertisement of sale was in [584] effect and prospective purchasers were looking over the property. Hence, it was necessary to devise some plan whereby a definite date of sale could be fixed so that a sale could be made as of this date and this plan also had to provide for the continued operation of the stores. Had the stores been closed on October 1st, at the time they were advertised for sale, and only a keeper placed in charge, they would not have presented the appearance of going business and would not have enlisted the interest or created the favorable impression necessary to command the splendid prices finally obtained from the purchasers.

In order to carry out this work successfully I composed a letter of information dealing with the stores both individually and collectively and this letter of information was supplied to all prospective purchasers and a copy was mailed to many merchants throughout the Country, who made no inquiry but who were in the merchandising business and whom we felt might be interested in ob-

taining one or more of the stores. It is sufficient to say, that every effort was made to interest as many buyers as possible and a great deal of time and effort was given to their personal inquiries, verbally where personal contact could be had, and by letter where personal contact was impossible. Each prospective buyer was supplied with all the information I could possibly give him. A copy of this letter to the prospective buyers is hereto attached and is self-explanatory.

The selling of these stores, the interviewing of prospective buyers, communicating with prospective buyers by letter and by telegram, consumed as much time and required as much attention and close application as did the running of the stores and since the businesses were still being conducted during the time the sales were being made the work was doubled and I found myself engrossed in this business to the extent that I was busy from early in the morning until late at night and also on most Sundays and [585] holidays. It is impossible to ever be free from work of this kind if it is taken seriously.

When these negotiations were completed, and confirmation of the sales was obtained from the Courts, and delivery made to the purchasers, and final settlement made with the purchasers, the stores had then been in operation from June 3rd to November 3rd, a period of five months.

RESULT OF THE SALE OF THE STORES.

As a result of the sale of the stores $257,600.00

was realized. Prior to the consummation of these sales an effort had been made in New York to dispose of these stores and bids had been received there by McManus, Ernst & Ernst and my Co-Receiver, A. F. Gotthold. During the time the sale was in progress I was in constant telegraphic communication with these people and learned from them that the best offer they had received was $325,000.00 for all of the assets of the R. A. Pilcher Company, including the sixteen stores and also including the cash on hand amounting to approximately $228,478.69, which had been obtained by sales of merchandise over the counter from June 3rd to October 1st. The total amount received for the stores was $257,600.00, to which may be added the cash on hand, thus making a total of $486,078.69 received for the assets in the jurisdictions of California, Oregon and Washington. Thus, we received approximately $137,625.19 more than the best price obtainable in New York.

During the time the stores were being advertised for sale, that is during the months of October and November, I was interviewed by dozens of prospective purchasers in Oakland, Portland and Seattle and communicated by letter or telegram with dozens of people who were interested and whom I never saw. Many of these prospective purchasers who were interested in acquiring various stores, filed their bids with me together with their deposits, the aggregate of which amounted to $87,-713.85. Thus I was forced to handle and be re-

sponsible for funds far in excess of those involved [586] in the ordinary conduct of the business.

AMOUNT OF FUNDS HANDLED.

During the administration, sales aggregating $499,700.00 were made in the stores over the counter during the receivership. To this may be added the sale of the stores aggregating $257,600.00, making total sales aggregating $756,863.28. $87,713.85 deposited with bids was returned to unsuccessful bidders. This amount I had to be responsible for while it was in my possession.

PURCHASERS OF THE STORES.

The stores were sold as follows:

1.	To J. S. Waugh of Aberdeen, Washington, the stores at Bremerton, Monroe, Aberdeen, Everett and Tacoma, Washington, for	$ 90,000.00
2.	To Harrison's Inc. of Wenatchee, Washington, the store at Wenatchee, for	13,000.00
3.	To Phillip A. Ditter of Yakima, Washington, the store at Yakima, for	16,000.00
4.	To Tanhauser Hat Company of Portland, Oregon, the stores at Roseburg, Portland, Albany, Klamath Falls, and Eugene, Oregon, for	85,600.00
5.	To Liberman & Rosencrantz of San Francisco, the store at Pendleton, Oregon, for	12,000.00

6. To A. L. May, of San Francisco, the stores at Turlock, Stockton and Oroville, California, for 41,000.00

$257,600.00

CLAIMS.

After the work in connection with the sale of the stores was completed I devoted my time to the claims that had been filed against the estate. Upon investigation, I found that only a part of the claims against the estate had been filed with me, the remainder having been sent to New York. I also learned that many of the claims in the District of California had been filed with the San Francisco Board of Trade and that they, instead of filing these claims with me in California had sent them to the Receiver in New York. This caused delay and some confusion.

After going thoroughly into the matter of the [587] claims, I discovered it would be very difficult to coordinate the business of the Receivers, with part of the claims in New York and part of them in my office in Oakland. Then too, the original books of the Company were still in New York and we had here no means of checking the claims to determine their correctness. I had made numerous attempts to get from my Co-Receiver in New York a statement showing accurately the amount of indebtedness, as shown by the books of the Company, and other information necessary to the handling of the claims.

Being unsuccessful in obtaining this information and realizing that time was being lost and that further complications would soon arise as a result of these records being scattered, I found it necessary to send Mr. Phillip A. Hershey, Accountant for the Receivers, to New York to make an audit of the accounts as shown by the books of the R. A. Pilcher Company and obtain other necessary information in connection with the verifying of the claims that had been filed and were still to be filed against the estate. Upon Mr. Hershey's arrival in New York, he found that comparatively nothing had been done toward an audit of the books and accounts of the Company and it required approximately two weeks for him, working day and night, to compile an accurate and authentic statement of the various accounts, as shown by the books of the Company.

After much communication by telegram and by correspondence, I arrived at a definite understanding with the Attorneys and Receiver in New York, and they released to Mr. Hershey the claims that had been filed with them. These claims together with a statement of the indebtedness of the Company were brought by Mr. Hershey to Oakland, where all of the claims were checked against the amounts shown on the books of the R. A. Pilcher Company. The claims were all checked carefully and where discrepancies were found [588] the matter of adjustments were taken up with the creditors and corrections made. The number of claims

filed aggregated six hundred and forty-seven, while the amount of such claims aggregated $747,000.00.

In going over the claims, errors were discovered and many of the amounts did not correspond with the books of the Company. Many of these adjustments were made amicably by correspondence, while others were settled before a Master in Chancery. Thus the aggregate of the claims was reduced to approximately $728,000.00.

The work of auditing and adjusting these claims was consummated as quickly as possible and early in December an order was obtained from the Courts permitting the payment of a dividend of forty per cent to all creditors, whose claims had been allowed and were in regular order. During the working up of the claims preparatory to paying the first dividend, we were engaged in thrasing out in the Court those claims which had to go before a Master in the District of California, which were five in number, and I was, through Mr. Eliassen, in constant communication with Attorneys and claimants in Oregon, where numerous claims were involved. When the claims that were in dispute had been finally acted upon the dividends were paid thereon according to the order of the Courts and early in 1927 a second dividend of ten per cent was paid to all creditors.

On or about December 6th, at the time we appeared before the Courts in the various jurisdictions to obtain orders to pay the first dividend, Mr. Eliassen and myself made application to the Courts for allowances on account for services ren-

dered. However, before doing this, we received word from McManus, Ernst & Ernst of New York stating that they, together with Mr. Gotthold, Receiver in New York, were making application there for allowances on account and asking information as to how much Mr. Eliassen and myself [589] would ask the Courts to award to us in the Ancillary jurisdictions as a payment on account.

While the correspondence in regard to these payments on account was going on between New York and Oakland, Mr. Eliassen and I, by appointment, interviewed Mr. Walton N. Moore and Mr. Joseph Kirk at the office of Mr. Kirk in the Board of Trade Building, San Francisco, at which interview the question of allowances on account was the chief topic of discussion. We informed Mr. Moore and Mr. Kirk that we proposed to ask the Court to make an allowance on account. However, we told them that we would not set an amount, but would leave the amount to be allowed, to the discretion of the Courts and whatever to the Courts seemed fair and equitable would be satisfactory to us.

After the Courts in the various jurisdictions had made the allowances to Mr. Eliassen and myself, I notified Mr. Walton N. Moore by wire of the result as I had agreed to do, the details of which are covered by telegrams and correspondence now in my possession. Mr. Moore and Mr. Kirk, after having known that we were going to ask for allowances on account and after agreeing that it was fair and equitable to allow the Courts to fix the allowances, were dissatisfied with the amounts allowed

and demanded that an adjustment be made. As a result of their action in this matter the closing of the receivership has been delayed and Mr. Eliassen and I have been put to a great deal of trouble and inconvenience as a result of the attitude of Mr. Moore and Mr. Kirk, who have employed attorneys to contest the matter of the allowances made to Mr. Eliassen and myself. Had it not been for Mr. Moore and Mr. Kirk the receivership would have been closed early in 1927.

SUMMARY.

It is impossible to set down here or make clear and comprehensive the tremendous amount of effort, energy, time, work [590] and close application put into this business during the time the stores were in operation and during the time the claims were being adjusted and settlements made with the creditors. However, some idea of the task may be gained from the fact that the amount of funds passing through my hands during the course of the receivership aggregated approximately One Million Dollars. The number of creditors aggregated six hundred and forty-seven, and the amount of their claims when finally adjusted, aggregated $728,000.00.

It may also be pointed out, that in addition to the taking of the inventories, directing the *activies* of the stores, buying merchandise, dealing with obstreperous creditors, conferring with the stockholders, conferring with my Attorney and with other Attorneys, conferring with the Accountants

for the Receivers and directing their *activies,* there were hundreds of details which evolved upon me that cannot be recalled now. However, it is sufficient to say, from that from the inception of the receivership the greater part of the day time was taken up in conference with those just referred to and with dozens of people who called upon me daily to learn something of the condition of the business and its future. Many of these callers were creditors or representatives of creditors, while some were prospective purchasers, in the event the property was to be sold, and some were of course apparently just curious. In addition to this, correspondence from among the six hundred and forty-seven creditors poured into my office and as both these callers and creditors were vitally interested and were entitled to information, it was encumbent upon me to confer with them personally and make replies to their written inquiries. All of this consumed the greater part of each day, thus necessitating my going over store reports, making plans for the direction of the business, and otherwise, making plans, calculations and analysis of the condition of the stores at night. [591]

During the fifteen months this receivership has been in effect, neither the objectors nor anyone else has ever been in my office, or in the office of the accountants to examine the report, or to confer, either with myself or the accountants or Mr. Eliassen, in regard to the condition of the estate, the results obtained, the amount of work done, or for the purpose of obtaining any other information in con-

nection with the receivership. The books of the Receivers, as well as the final account have at all times been open and available to anyone who would have cared to have taken the time or the interest to examine them. The accountants, the Attorney for the Receivers and myself have at all times been available and would have been glad at any time to have gone over, with anyone interested, the books and accounts of the Receivers and would have been glad to have discussed with them the amount of work done and the results obtained.

During my trips to the Northwest, practically all of my evenings were given to various creditors in connection with the business, or to prospective buyers in connection with the sale of the property. It is impossible for me to state here the number of nights devoted exclusively to this business. However, it may be said that I have given practically all of my time to this work, to the exclusion of my personal affairs, and it is a fact that where all of the duties connected with the operation of sixteen stores to which is added the duties of a Receiver for those stores, constitutes a task involving so much details and so much work that one is never free from it either day or night. [592]

RECEIVER'S EXHIBIT No. 4.

Consists of the statement prepared and submitted by Phillip A. Hershey, concerning the services rendered by him as an accountant for the Receivers; and which document is as follows: [593]

(Title of Case; Northern District of California.)

To the Honorable Judges of the United States District Court, Northern District of California:

The petition of Phillip A. Hershey respectively shows that he is the sole proprietor of the firm of Phillip A. Hershey & Co., Public Accountants, Central Bank Building, Oakland, California;

EMPLOYMENT.

That upon the request and engagement of A. F. Lieurance, Co-Receiver of the R. A. Pilcher Co., and under an order signed and dated August 9, 1926, by A. F. St. Sure of the United States District Court for the Northern District of California, and under an order signed and dated July 26, 1926, by Robert S. Bean of the United States District Court for the District of Oregon, and under an order signed and dated July 28, 1926, by J. Stanley Webster, of the United States District Court for the Eastern District of Washington, he and his assistants prepared and installed and kept proper accounting records for the administration of the administration of the receivership, and performed such other services as were required by the Receivers in Equity in connection with the administration of the estate. [594]

INSTALLATION OF ACCOUNTING SYSTEM.

That the following is a summary of the services performed in connection with the administration and accounting of the Receivers in Equity, Arthur F. Gotthold and A. F. Lieurance between the dates

of June 3, 1926, and April 30, 1927, a period of ten months and twenty-eight days.

CONDITION OF BOOKS AND RECORDS OF THE R. A. PILCHER CO., INC.

The condition of the books and records of the R. A. Pilcher Co., Inc., as of June 3, 1926, the date of the appointment of the Receivers, was, as we were informed and as we later found to be, incomplete, entries having lapsed with the end of February, 1926, approximately three months prior to the appointment of the Receivers. As these records were in New York City and of little value to the receivership, and upon instruction of Mr. A. F. Lieurance, Co-Receiver, proper books were opened which would reflect the transaction of the business daily. These books were as follows, journals in which were recorded sales, cash received, checks drawn, bank deposits, petty cash, expenditures, merchandise purchases, merchandise transfers and journal entries. There was also maintained a general ledger for each individual store. This task was amplified by reason of the fact that there were sixteen stores and a general office operating in five districts of the United States Courts. A separate set of books was opened for each store and for the general office. In other that jurisdictional rights and equities might not be disturbed and in conformity with proper practice, a system of accounting was installed which not only enabled the Receivers to maintain jurisdictional integrity but which also furnished them with operating reports of each of

the various units, scattered from California to Washington.

CORRESPONDENCE WITH STORES REGARDING BANK AND CASH BALANCE.

Due to the fact that complete reports, data and information were not available in Oakland, California, and could not be secured from New York, it was necessary to correspond with the stores referred to and secure such information, etc. as was required and to prepare from such information entries to open the books of the Receivers. In the course of this work the bank balances maintained by [595] each of the sixteen stores of the defendant were reconciled as of June 3, 1926, as was the Cash Balance on Hand as reported by the stores;

DAILY STORE REPORTS.

The stores reported their transactions daily, such reports showing previous balance, sales, cash paid out, amounts remitted to Receiver A. F. Lieurance, in Oakland, California, etc. Each of these reports was audited immediately upon its receipt in Oakland and all errors or discrepancies which appeared were taken up with Mr. Lieurance and letters were written at once that such errors or discrepancies might be corrected or supplied while the transactions were fresh in the minds of the store managers. Numerous errors did appear and were promptly corrected.

After audit the information contained in the re-

ports was entered in the proper place in the books of account.

INVENTORY.

On June 21, 1926, a complete physical inventory of all merchandise was taken concurrently in all sixteen stores. The inventory sheets were forwarded by express to Oakland, California, where the extensions were made, verified and totaled by myself or under my supervision. At the time this work was in process there were many urgent demands made upon me to hasten this phase of the work which was at that time being completed as expeditiously as possible under ordinary circumstances. It was, therefore, necessary for me and my assistants to remain engaged upon this work for many hours each day until the inventory was completed, a period of approximately eight days. In connection with the computation and verification of the inventory and to assist in its rapid conclusion, I was able to secure the use of fifteen calculating machines at a nominal rental to the Receivership. The inventory as finally computed was $599,717.72;

PURCHASE OF MERCHANDISE AND PURCHASE AUDIT.

During the course of the receivership it was necessary for the Receivers to purchase merchandise. These purchases were largely confined to fill-in orders which caused a large number of purchase orders to be issued and a correspondingly large number of invoices to be received. Accurate record of

all purchase orders issued, each bearing the authorization of Receiver Lieurance, was maintained. The receipt of the merchandise covered in the purchase order was checked by the report of each store manager of merchandise [596] received by him. This was in turn checked with duplicate invoices mailed directly to Oakland. All shortages and damages were deducted before invoices were paid. Prior to payment each invoice was audited, the extensions checked, the addition verified and the discount computed and deducted. During the course of the receivership all discounts available were taken and in total amounted to $2,654.34. Merchandise in the amount of $98,446.58 was purchased and paid for.

MERCHANDISE TRANSFERS.

From information disclosed by a detailed analysis of the inventory made by myself and from personal contact with the store managers made by Receiver Lieurance, it was found to be advisable to transfer merchandise, unsalable in one locality to another where the prospects of sale were greater. All such transfers were audited. Extensions checked, additions verified and proper entry made upon the books of account.

RECONCILEMENT OF BANK ACCOUNTS.

At the close of each month the seventeen bank accounts maintained by the Receivers in the Western Jurisdictions were reconciled with the books of account. These bank accounts were maintained in such fashion that the Receivers would be credited

with the largest amount of interest possible. The interest received on bank balances to the time of the filing of the final account is the sum of $3,539.-66.

AUDIT OF DISBURSEMENS.

With the exception of few minor local operating expenses, such as water, heat, light, etc., incurred by local store managers, all expense disbursements were made by check. Vouchers supporting all disbursements were audited daily, and reported in the proper books of account.

DAILY STATEMENTS.

Daily statements were prepared under instructions of Receiver Lieurance showing total sales for the day, sales to date, store expenses paid in cash, cash remitted to Oakland, California, merchandise invoices and expense vouchers paid and those not yet due and cash remaining on hand. These reports were made for each of the sixteen stores and a consolidated report for the total.

MONTHLY REPORTS.

In addition to daily statements a complete report was prepared at the close of each month showing the following [597] Receivers Cash Report, Consolidated Trial Balance, Schedule of Oakland Office Expenses, Consolidated Operating Statement with percentages and as an individual operating statement for each store with percentage.

INSURANCE.

Insurance policies were checked and insurance in

force was increased or decreased as the inventory reflected the effect of sales, purchases and transfers.

DAILY CONFERENCE REGARDING SALE OF STORES.

After the stores were advertised for sale and up until the confirmation of sales I was called into daily conferences with Receiver Lieurance, prospective purchasers and Attorney Edw. R. Eliassen respecting the previous sales of the various stores, the approximate inventory and the fixed and variable expenses of each of the units.

DETAILED SETTLEMENT STATEMENT FOR PURCHASERS OF STORES.

The stores were all sold as going concern*ings*. It was, therefore, necessary to prepare a detailed settlement statement for each of the various purchasers. The preparation of these statements and their explanatory remarks together with correspondence with the purchasers was an exacting and arduous labor.

Insurance and taxes were pro-rated, expenses were calculated to the date of sale and an accounting made which was in all cases satisfactory to both the Receivers and the purchasers.

FILING OF CLAIMS.

Pursuant to published and mailed notices creditors had been filing claims with Receiver Lieurance in Oakland, California, and with Receiver Gotthold in New York City. As these claims were received in Oakland they were tabulated and filed.

Upon advices received from New York it was found that some claims had been filed both in New York and California. That there might be no confusion or duplication in the tabulation of the claims and in order that their total amount could be determined in as short a time as possible, I did, under instructions of Receiver Lieurance and acting under an order signed and dated October 25, 1926, by A. F. St. Sure of the United States District Court for the Northern District of California, and an order signed and dated October 27, 1926, by Robert S. [598] Bean of the United States District Court for the District of Oregon, and an order signed and dated October 29, 1926, by J. Stanley Webster of the United States District Court for the Eastern District of Washington, leave Oakland, California, November 10, 1926, for New York City where I remained until all proofs of claims then filed had been checked against the books of the R. A. Pilcher Co., Inc. I prepared a schedule of the liabilities showing the ledger balances prior to adjustment, the necessary adjustments, the adjusted ledger balances, the claim filed, the adjustments thereto and the claim as finally allowed. In connection with the checking and verifying of the claims as filed with the books of account, it was necessary to check all items as shown on the proof of claim, with all items as shown by the ledger account on the books of the corporation, which had been posted from February 28 to June 3, 1926, the

TRIP TO NEW YORK CITY.

VERIFICATION OF CLAIMS.

date of the inception of the receivership. During the course of this particular work it was necessary to correspond at length with Receiver Lieurance, by letter, wire and telephone.

ATTENDANCE AT NEW YORK CREDITORS MEETING.

While in New York I attended at the instructions of Receiver Lieurance, a meeting of the New York Creditors Committee and reported, on behalf of Receiver Lieurance, the condition of the receivership. I also worked with a representative of the New York Credit Mens Clearing Bureau, late into the night mailing notices to creditors who had not filed proofs of claims so that they might participate in the first dividend to then be paid. The schedules above referred to were finally completed and I returned to Oakland, California, December 18, 1926, having been absent from my office on business connected with the receivership a period of thirty-eight days.

SCHEDULE OF LIABILITIES.

Upon my return to Oakland I and my assistants under Receiver Lieurance's instructions, began the preparation of a final schedule of the liabilities of the defendant company as adjusted and the claims filed to date. It was found that many creditors whose claims aggregated seventy-five thousand dollars, had failed [599] to file proofs of claim. The creditors were corresponded with by me under the direction of Mr. Lieurance and urged to file a claim or waive their rights.

PAYMENT OF FIRST DIVIDEND.

Upon instructions of Mr. Lieurance, schedules for the payment of the first dividend were prepared, the amounts computed and balanced and the checks written, whereupon they were delivered to Receiver Lieurance for his examination and approval.

NUMBER OF CREDITORS ACCOUNTS AND CLAIMS.

There were six hundred and eighty-seven creditors accounts appearing upon the books of the defendant company, totaling $690,338.44 prior to adjustment, after adjustments of $44,751.30 these accounts were six hundred and eighty-seven in number totaling $735,089.04. There were six hundred and forty-seven claims allowed; nine preferred, totaling $5,816.34 and six hundred and thirty-eight general, totaling $718,794.12, a grand total of $724,-610.46. Each of these claims were personally examined by me together with Receiver A. F. Lieurance.

TESTIMONY AT MASTER'S HEARINGS.

Under instructions of Receiver A. F. Lieurance I attended and gave testimony at hearings held before the Master appointed to hear disputed claims filed with the Receivers and upon the request of Receiver A. F. Lieurance prepared information relative to disputed claims which were heard before a Master in other jurisdictions.

EXAMINATION OF PORTLAND, ORE. AND BREMERTON, WASH., STORES.

Under instructions *or* Receiver Lieurance I left

Oakland, California, September 17, 1926, for Portland, Oregon, and Bremerton, Washington, for the purpose of checking the cash accounts at these stores and to check up the stores at Everett and Monroe, Washington. As a result of an examination of the cash account at Portland, Oregon, I secured the payment to the Receivers of an amount in excess of $600.00 as found to be carried as I. O. U. slips in the cash account. This condition had existed prior to the inception of the receivership. Conditions in this store were found to be such that it was necessary to discharge the manager and two other employees of this store, which situation I immediately reported by wire to Receiver A. F. Lieurance and was by him instructed to select and [600] employ a manager. I selected this manager and instructed him in his duties. At Bremerton, Washington, conditions were found which justified the discharge of two of the employees, such conditions being immediately reported by wire to Receiver Lieurance who instructed me to discharge these employees. I also visited other stores of the defendant company while in the northwest. After completing this work I returned to Oakland, California, September 26, 1926, having been absent from my office on business of the receivership for a period of ten days.

PREPARATION OF FINAL ACCOUNT.

Under instructions of Receiver Lieurance I and my assistants prepared a detailed final account of the Receivers for each jurisdiction. Each of these

reports contain six hundred and five pages and is an itemization of every transaction of the Receivers in all jurisdictions. Ten copies of this report were made involving the handling and arranging of six thousand and fifty pages. This report was made up from the daily records kept from the beginning of my employment to the date of the filing of the final account. Due to the nature of this receivership and the tremendous number of items handled and in the preparation of this final account, it was required that I hold myself in readiness at all times to respond to the call of Receiver Lieurance and Attorney Eliassen and that I did so at all time subordinating other work to this service.

PAYMENT OF SECOND DIVIDEND.

When the second dividend was declared I and my assistants, acting under instructions *or* Receiver Lieurance, prepared a schedule for payment, computed the amounts due each creditor, prepared the checks for signature and delivered same to Receiver A. F. Lieurance.

CORRESPONDENCE, WIRES, ETC. HANDLED.

During the course of this receivership I have been absent from my office and the City of Oakland on business of this receivership for a total number of forty-eight days. I have written or caused to be written in excess of two hundred letters and one hundred wires. I have talked from New [601] York with Receiver Lieurance in Oakland by long distance telephone. During the

absence of Receiver Lieurance from Oakland on business of the receivership I kept him informed fully and daily of all matters pertaining to this receivership, doing such things as were necessary to the conduct of the stores and of the receivership. For months I was in daily conference with Receiver Lieurance and his attorney, Edward R. Eliassen, these conferences occurring not only during the ordinary hours of business occupancy but at nights, on Sundays and holidays.

All these services which have been heretofore detailed in this statement consumed considerable time and extended over a period from June 3, 1926 to April 30, 1927. [602]

EXHIBITS FOR PLAINTIFF 3, 4, 5, 6, AND 7.

Consist of five reports rendered by the receivers. The originals of such exhibits will be transmitted to the Appellate Court, for use upon the appeal upon the order of the Judge of the court, and pursuant to stipulation of the parties.

RECEIVER'S EXHIBIT 9.

Consists of communications addressed by Receiver Lieurance to the several store managers. The original of such exhibit will be transmitted to the Appellate Court, for use upon the appeal, upon the order of the Judge of the court, and pursuant to stipulation of the parties.

PLAINTIFF'S EXHIBIT 10.

Consists of certain data assembled by Receiver Lieurance and sent by him to prospective pur-

chasers of the several stores. The original of such exhibit will be transmitted to the Appellate Court, for use upon the appeal, upon the order of the Judge of the court, and pursuant to stipulation of the parties.

RECEIVER'S EXHIBIT 11.

Consists of certain data showing the general value of the leasehold interests owned by the defendant R. A. Pilcher Co. Inc. at the time of the initiation of the receivership. The original of such exhibit will be transmitted to the Appellate Court, for use upon the appeal, upon the order of the Judge of the Court, and pursuant to stipulation of the parties.

RECEIVER'S EXHIBIT 12.

Consists of four stipulations, one in each of the four "Western jurisdictions" in which the receivership proceedings were [603] pending, including the above-entitled court, reducing the amount of temporary allowances made in favor of the Receivers and their attorney herein. The originals of such exhibit will be transmitted to the Appellate Court for use upon the appeal, upon the order of the Judge of the court, and pursuant to stipulation of the parties.

The final account filed by the receivers herein on May 17, 1927, together with the supplemental Receivers' account filed October 19, 1927, were referred to in the evidence, and some of the features thereof are material upon the appeal herein. The originals

of such documents will be transmitted to the Appellate Court, for use upon the appeal, upon the order of the Judge of the court, and pursuant to stipulation of the parties. [604]

[Title of Court and Cause.]

STIPULATION FOR SETTLEMENT OF STATEMENT OF THE EVIDENCE AND TRANSMISSION OF CERTAIN ORIGINAL DOCUMENTS TO APPELLATE COURT.

In the above-entitled matter, the appellants served and filed a proposed statement of the evidence, and thereafter, within due time, the respondents have served and filed 21 proposed amendments thereto.

The matter of the settlement of such statement of the evidence came on for hearing, and at such hearing, the attorneys for the respective parties have agreed, and hereby stipulate, as follows:

(1) The respondents withdraw their proposed amendments Nos. 13, 14, 17, 18, 19, 20 and 21.

(2) The appellants consent to all of the other amendments proposed by the respondents.

(3) The appellants and the respondents agree that the statement of the evidence, as proposed by the appellants, with the amendments proposed by the respondents and consented to by the appellants as above stated, shall be settled and allowed by the Court as the statement of the evidence herein, and for use upon the appeal herein. [605]

(4) Attached hereto is an engrossed copy of the statement of the evidence, agreed upon by the appellants and the respondents, respectively, as hereinbefore stated; and the appellants and respondents have agreed and do hereby stipulate, that the same may be settled, allowed and certified by the Judge of the above-entitled court, and that the same may be filed in the above-entitled cause, as the statement of the evidence therein, for use upon the appeal therein.

(5) Under the above stipulation, exhibits for Plaintiff Nos. 3, 4, 5, 6, 7 and 8, Receiver's Exhibit No. 9, Plaintiffs' Exhibit No. 10 and Receivers Exhibit No. 11 were omitted from such statement of the evidence but with the express understanding, and the appellants nad respondents hereby stipulate, that each and all of the original exhibits just mentioned together with original Receiver's Exhibit No. 12 shall be transmitted to the Appellate Court, properly certified and identified by the clerk of the above-entitled court, for use upon such appeal, and with the same force and effect as if included in such statement of the evidence, and as if the same were printed in full in the transcript of the record upon such appeal, the printing thereof being hereby waived.

(6) The parties to this stipulation further stipulate that the original final account filed by the Receivers herein, being document No. 44 in the files of the clerk of the above-entitled court, and the supplemental Receivers' account, filed October 19, 1927, and being document No. 67 in the files of the

clerk of the above-entitled court, shall be transmitted to the Appellate Court, properly certified and identified by the Clerk of the above-entitled court, for use upon such appeal, and with the same force and effect as if included in such statement of the evidence, and as if the same were printed in full in the transcript of the record upon such appeal, the printing thereof being hereby waived. [606]

(7) It is further stipulated by and between the parties hereto that an order or orders may be made and entered herein to carry into effect the foregoing provision of this stipulation without further notice by or to either of the parties to this stipulation.

Dated: November 26, 1928.

FRANCIS J. HENEY,
GRANT H. WREN,
C. A. SHUEY,
Attorneys for Appellants.

CROSBY & CROSBY,
EDWARD R. ELIASSEN,
Attorneys for Respondents. [607]

[Title of Court and Cause.]

ORDER APPROVING STATEMENT OF THE EVIDENCE AND ORDER DIRECTING CLERK TO TRANSMIT CERTAIN ORIGINAL DOCUMENTS TO APPELLATE COURT.

It appearing that heretofore, and in due time,

the objecting creditors (appellants) in the above-entitled cause served and lodged with the clerk of this court a proposed statement of the evidence, for use upon the appeal in such action; and that thereafter, and in due time, the respondents (A. F. Lieurance, Edward R. Eliassen and Phillip A. Hershey Co.) served and filed certain proposed amendments to such proposed statement of the evidence; and that thereafter, the appellants consented to certain of the amendments proposed by the respondents, and the respondents withdrew the other amendments proposed by them; and that thereupon, the appellants and respondents engrossed the foregoing statement of the evidence, to conform to the agreement between them concerning the form and contents of such statement of the evidence, and have stipulated that the foregoing may be settled, allowed and certified by the Judge of the above-entitled court, and that the same may be filed in the above-entitled cause, as the statement of the evidence therein, for use upon the appeal therein;

NOW, THEREFORE, pursuant to the above mentioned stipulation of the parties, and due cause appearing therefor: [608]

I, A. F. ST. SURE, Judge of the United States District Court for the Northern District of California, and the Judge before whom the above-entitled cause was tried, do hereby certify that the foregoing is a true and complete statement of all evidence essential to the decision of the questions presented by the appeal of the objecting creditors from the judgment and decree made and entered

herein on March 27, 1928, approving the report and findings of the Special Master, and overruling all objections thereto, and adjudging and decreeing that the final account of the Receivers and the report accompanying the same be approved, and that the compensation of Receiver A. F. Lieurance be fixed at the sum of $35,000, and the compensation of Attorney Edward R. Eliassen be fixed at the sum of $30,000, and that the Receiver pay to Phillip A. Hershey, accountant for the Receivers, the additional sum of $769.71; and I do hereby approve the same as the statement of the evidence in said matter for the purpose of said appeal; and I do hereby ORDER that the same become a part of the record for the purpose of said appeal; and I do FURTHER ORDER that that part of said statement of the evidence which is set out in other than narrative form, is hereby approved.

And it further appearing that the appellants and respondents have further stipulated that certain original documents hereinafter mentioned, shall be transmitted to the Appellate Court, in the manner, and for use upon the appeal in such action, as hereinafter provided; and it appearing to the Court that under the rules applicable to the subject, such original document should be transmitted to the Appellate Court for use on such appeal, in lieu of the printing thereof in the transcript of record on such appeal;

NOW THERFORE, pursuant to such further stipulation of the parties, above mentioned, and due cause appearing therefor,

IT IS HEREBY ORDERED:

(1) That the original documents hereinafter mentioned, [609] properly certified and identified by the Clerk of this court, shall be transmitted by the Clerk of this court, together with the transcript of the record upon such appeal, to the clerk of the Circuit Court of Appeals of the United States, for the Ninth Circuit, for use upon such appeal, and with the same force and effect as if such documents were included in the statement of the evidence, and with the same force and effect as if the same were included and printed in the transcript of the record upon such appeal, the printing thereof being hereby dispensed with; such documents to be returned to files of this court, upon the termination of such appeal and with the remittitur from the Appellate Court in such cause.

(2) The original documents to be transmitted to the Appellate Court as above provided, are as follows:

(a) The final account filed in the office of the clerk of this court by the Receivers in the above-entitled action on May 17, 1927, being document No. 44 in the files of the clerk of this court;

(b) The supplemental Receivers' account, filed in the office of the clerk of this court on October 19, 1927, and being document No. 67 in the files of the clerk of the above-entitled court;

(c) Those certain exhibits introduced in evidence during and upon the trial and hearing of the matter involved in such appeal; and being identified as Exhibits for Plaintiff Nos. 3, 4, 5, 6, 7 and 8,

Receiver's Exhibit No. 9, Plaintiff's Exhibit No. 10, Receiver's Exhibit No. 11 and Receiver's Exhibit No. 12; all of which exhibits were identified, as above stated by the Special Master before whom the trial and hearing of such matter was conducted, and were by such Special Master filed with the clerk of this court.

Dated: November 27, 1928.

[Endorsed]: Filed, Nov. 27, 1928.

A. F. ST. SURE,
District Judge. [610]

[Title of Court and Cause.]

PETITION FOR APPEAL AND ORDER GRANTING SAME.

To the Hon. A. F. ST. SURE, United States District Judge, in and for the Northern District of Southern Division:

Walton N. Moore Dry Goods Co., J. H. Newbauer & Company, G. W. Reynolds Co., Inc. and L. Dinkelspiel Co., Inc., (creditors of the above-named defendant, R. A. Pilcher Co., and who, on their behalf, and on behalf of 55 other California creditors of the above-named defendant, interposed certain objections and exceptions to the final account and report of the Receivers, and to the petition for allowance of further fees and compensation to Receiver Lieurance or to Edward R. Eliassen, attorney for the Receivers) feeling themselves aggrieved by the judgment and decree made and entered in

this cause on the 27th day of March, 1928 (which judgment and decree, among other things, approved and confirmed the final accounts and reports of the Receivers herein, allowed and fixed the sum of $30,000 as compensation to be paid to [611] Edward R. Eliassen, attorney for the Receivers, and the sum of $35,000 as compensation to Receiver Lieurance and the sum of $769.71 as additional compensation to Phillip A. Hershey as accountant for the Receivers, and which judgment and decree approved, ratified and confirmed the report and findings of the Special Master in the premises, and overruled all objections and exceptions thereto), do hereby appeal from said judgment and decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herewith;

And they pray that their appeal be allowed, that citation issue as provided by law, that a transcript of the record, proceedings and papers upon which said judgment and decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeal for the Ninth Circuit sitting at San Francisco, California, and that the proper order be made, concerning the security to be required of them to perfect their appeal.

Dated: June 27, 1928.

[Endorsed]: Filed June 27, 1928.

FRANCIS J. HENEY,
GRANT H. WREN,
C. A. SHUEY,

Attorneys for Creditors, Walton N. Moore Dry Goods Co., J. H. Newbauer & Company, G. W. Reynolds Co., Inc., and L. Dinkelspiel Co., Inc.

Petition granted and appeal allowed upon giving bond conditioned as required by law in the sum of $250.00.

Dated: June 28, 1928.

(Signed) A. F. ST. SURE,

United States District Judge, in and for the Northern District of California, Southern Division.

[612]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Walton N. Moore Dry Goods Co., J. H. Newbauer & Company, G. W. Reynolds Co., Inc., and L. Dinkelspiel Co., Inc., objecting creditors in the above-entitled cause, in connection with their petition for appeal in this case, assign the following errors, which they aver occurred in the trial and decision of the issues covered by the judgment and decree from which the appeal is taken, and upon which they rely to reverse the judgment and decree entered herein on March 27, 1928, as appears of record:

1. The Court erred in overruling the objections

and exceptions to the report and findings of the Special Master, dated January 19, 1928, for the reasons and upon the grounds stated in such objections and exceptions, as the same appear of record, to which reference is hereby made, and which are hereby made a part hereof, and leave of Court is hereby asked that the same be considered and treated as part hereof, with the same force and effect as if set forth in full herein; also for all of the reasons and upon all of the grounds hereinafter stated in assignments of error, Nos. 3, 4, 5, 6 and 7.

2. The Court erred in approving, ratifying and confirming [613] the report and findings of the Special Master, dated January 19, 1928, for the reasons and upon the grounds stated in the preceding assignment of error.

3. The Court erred in approving, ratifying and confirming the final accounts and reports of the Receivers, and particularly as to the items of $10,000.00 paid to Phillip A. Hershey, for alleged services as accountant, for the reason and upon the grounds, as follows:

(a) The evidence proved that Phillip A. Hershey was employed and rendered his services under a contract of employment under which he was to receive compensation in the sum of $350.00 per month, which was paid.

(b) The additional payments, in the aggregate sum above stated, constituted gratuitous payments, purporting to have been made as compensation for services for which full compensation had already been made; and such

additional payments were in violation of the contractual and other rights of the creditors, and contrary to law.

(c) The services rendered by Phillip A. Hershey were of an actual and reasonable value not exceeding the sum of $350.00 per month, and which was paid to him, in addition to the payments above objected to.

(d) For the reasons hereinbefore stated, the approval, ratification and confirmation of such additional payments to Phillip A. Hershey are unsupported by and contrary to the evidence, are contrary to law, and constitute an abuse of discretion on the part of the trial court.

4. The Court erred in allowing to Phillip A. Hershey the further sum of $769.71 and ordering the Receiver A. F. Lieurance to pay the same, for the reasons and upon the grounds set forth in the last preceding assignment of error. [614]

5. The Court erred in allowing and fixing the sum of $30,000 as compensation to be paid to Edward R. Eliassen, as attorney for the Receivers, for the reasons and upon the grounds, as follows:

(a) The evidence proved that the services rendered by Edward R. Eliassen, as attorney for the Receivers, were of a value not exceeding the sum of $15,000.00.

(b) The allowance of any sum in excess of the sum of $15,000.00, above mentioned, was unsupported by and contrary to the evidence,

and contrary to law, and constituted an abuse of discretion on the part of the trial court.

6. The Court erred in allowing and fixing the sum of $35,000 as the compensation of A. F. Lieurance as Receiver for the reasons and upon the grounds, as follows:

(a) The evidence proved that the services rendered by A. F. Lieurance as Receiver, were of a value not exceeding the sum of $15,000.00.

(b) The allowance of any sum in excess of $15,000, above mentioned, was unsupported by and contrary to the evidence, and contrary to law, and constituted an abuse of discretion on the part of the trial court.

7. The Court erred in entering the judgment and decree of March 27, 1928, upon each and all of the grounds hereinbefore stated, and upon each and all of the reasons and grounds stated in the exceptions to the report of the Special Master dated January 19, 1928, which exceptions appear of record herein, and to which reference is hereby made, and which are hereby made a part hereof; and leave of Court is again asked that the same be considered and treated as part hereof with the same force and effect as if set forth in full herein.

Dated: June 27, 1928.

FRANCIS J. HENEY,
GRANT H. WREN,
C. A. SHUEY,

Attorneys for Walton N. Moore Dry Goods Co., J. H. Newbauer & Company, G. W. Reynolds Co., Inc., and L. Dinkelspiel Co., Inc.

[Endorsed]: Filed June 27, 1928. [615]

[Title of Court and Cause.]

PETITION FOR AND ALLOWANCE OF SUPERSEDEAS.

Walton N. Moore Dry Coods Co., J. H. Newbauer & Company, G. W. Reynolds Co., Inc., and L. Dinkelspiel Co., Inc., (having on June 27, 1928, petitioned for an appeal from the judgment and decree entered in the above-entitled action on March 27, 1928, and such appeal having been allowed on June 28, 1928), hereby petition the Court for the allowance of a supersedeas in said action, upon said appeal, and to fix the amount of the supersedeas bond to be furnished by the appellants above named; and ask that the order allowing such supersedeas and fixing the amount of the supersedeas bond shall provide that the supersedeas bond and the cost bond heretofore required, may be combined in one bond, to be conditioned as required by law.

Dated: June 30, 1928.

FRANCIS J. HENEY,
GRANT H. WREN,
C. A. SHUEY,

Attorneys for Walton N. Moore Dry Goods Co., J. H. Newbauer & Company, G. W. Reynolds Co., Inc., and L. Dinkelspiel Co., Inc.,
Appellants. [616]

Supersedeas in the above-entitled action is hereby allowed; the amount of the supersedeas bond to be furnished by the appellants is hereby fixed at the

sum of $5,000.00; and such supersedeas bond may be combined with the cost bond heretofore required, in the sum of $250, in which event, such combined bond shall be for the aggregate sum of $5,250.00, shall be conditioned as required by law, and shall be subject to the approval of the Court.

Dated: July 3, 1928.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed July 10, 1928. [617]

The premium charged for this bond is $52.50 *Dollars* per annum.

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Walton N. Moore Dry Goods Co., J. H. Newbauer & Company, G. W. Reynolds Co., Inc., and L. Dinkelspiel Co., Inc., as principals and Fidelity and Deposit Company of Maryland (a surety company organized under the laws of the State of Maryland and authorized to transact the business of surety in the State of California), as surety, are held and firmly bound unto A. F. Lieurance, Edward R. Eliassen and Phillip A. Hershey in the full and just sum of Five Thousand Two Hundred and Fifty Dollars, to be paid to the said A. F. Lieurance, Edward R. Eliassen and Phillip A. Hershey, their respective executors, administrators or assigns;

to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3d day of July, in the year of our Lord one thousand nine hundred and twenty-eight.

WHEREAS, lately at a District Court of the United States for the Northern District of California (Southern Division), in a suit pending in said court, between Sidney Gilson, Herman Avrutine and Samuel Avrutine, copartners engaged in business as National [618] Garment Co., plaintiffs and R. A. Pilcher Co., Inc., defendant (which suit was numbered in the Equity Department of said court as "In Equity No. 1707"), a judgment and decree was rendered under date of March 27, 1928, which judgment and decree, among other things, approved and confirmed the final accounts and reports of the Receivers herein, allowed and fixed the sum of $30,000 as compensation to be paid to Edward R. Eliassen, attorney for the Receivers, and the sum of $35,000 as compensation to Receiver Lieurance and the sum of $769.71 as additional compensation to Phillip A. Hershey as accountant for the Receivers, and which judgment and decree approved, ratified and confirmed the report and findings of the Special Master in the premises, and overruled all objections and exceptions thereto; and the said Walton N. Moore Dry Goods Co., J. H. Newbauer & Company, G. W. Reynolds Co., Inc., and L. Dinkelspiel Co., Inc., having obtained from said Court an appeal to reverse the above-mentioned

judgment and decree in the aforesaid suit, and a citation directed to the said A. F. Lieurance, Edward R. Eliassen and Phillip A. Hershey citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California;

Now, the condition of the above obligation is such, That if the said Walton N. Moore Dry Goods Co., J. H. Newbauer & Company, G. W. Reynolds Co., Inc., and L. Dinkelspiel Co., Inc., shall prosecute their aforesaid appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and effect.

It is further stipulated as a part of the foregoing bond, that in case of a breach of any condition thereof, the above-named District Court may, upon notice to the surety above [619] named of not less than ten days, proceed summarily in said action or suit to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against said surety and award execution therefor.

WALTON N. MOORE DRY GOODS CO.,
J. H. NEWBAUER & COMPANY,
G. W. REYNOLDS CO., INC.,
L. DINKELSPIEL CO., INC.,
(Principals).
By GRANT H. WREN,
Their Attorney.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

(Surety).

[Corporate Seal] By F. W. SWINGLEY,
Atty.-in-fact.

Attest: ANNA GIBSON,
Agent.

The foregoing bond is approved July 9th, 1928.

A. F. ST. SURE,
United States District Judge. [620]

State of California,
City and County of San Francisco,—ss.

On this 3d day of July, A. D. 1928, before me Amy B. Townsend, a notary public in and for the city and county of San Francisco, residing therein, duly commissioned and sworn, personally appeared E. W. Swingley, attorney-in-fact, and Anna Gibson, agent, of the Fidelity and Deposit Company of Maryland, a corporation, known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be the persons whose names are subscribed to the within instrument as the attorney-in-fact and agent respectively of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney-in-fact and Agent respectively.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the City and County of San Francisco, the day and year first above written.

AMY B. TOWNSEND,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires Oct. 29, 1930.

[Endorsed]: Filed July 10, 1928. [621]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the Above-named Court:

You will please prepare and certify transcript of record on appeal in the above-entitled cause consisting of the following:

1. Complaint of the plaintiffs herein (being document No. 1 in the files of this action).
2. Exemplified copies of proceedings in original proceeding (being document No. 7 in the files of this action).
3. Order making temporary appointment of Receivers Lieurance and Gotthold (being document No. 2 in the files of this action).
4. Order making permanent appointment of Receivers Lieurance and Gotthold (being document No. 14 in the files of this action).
5. Receivers' report accompanying final account (being document No. 38 in the files of this action).

6. Petition of Receivers for settlement and approval of their final account and report, and for an order finally fixing the fees and compensation of A. F. Lieurance as Receiver and [622] Edward R. Eliassen as attorney for Receivers (being document No. 39 in the files of this action).

7. Objections and exceptions to final account and report of the Receivers, also to the petition for allowance of further fees and compensation to Receiver Lieurance and Attorney Eliassen (being document No. 50 in the files of this action).

8. Answer of Receivers to the objections and exceptions to final account and report of Receivers filed herein (being document No. 63 in the files of this action).

9. Order of the United States District Court for the District of Oregon, transferring to the above-named court, the same general issues concerning the Receivers' account and the allowance of fees, pending in the District of Oregon, for a consolidated hearing of all of such issues, by the above-named court (being document No. 55 in the files of this action).

10. Order of the United States District Court for the Western District of Washington, transferring to the above-named court, the same general issues concerning the Receivers' account and the allowance of fees, pending in the Western District of Washington, for a consolidated hearing of all of such issues, by the above-named court (being document No. 56 in the files of this action).

11. Order of the United States District Court for the Eastern District of Washington, transferring to the above-named court, the same general issues concerning the Receivers' account and allowance of fees, pending in the Eastern District of Washington, for a consolidated hearing of all of such issues, by the above-named court (being document No. 57 in the files of this action).

12. Order of reference to a Special Master (being minute order under date of September 20, 1927). [623]

13. Report and findings by the Special Master (being document No. 78 in the files of this action).

14. Exceptions to the Report and findings of the Special Master (being document No. 82 in the files of this action).

15. Order and decree made and entered herein on March 27, 1928, confirming the report and findings of the Special Master and overruling exceptions thereto; and adjudging and decreeing that the final and supplemental accounts of the Receivers be approved, ratified and confirmed, and fixing the Receiver's fee at $35,000 and the fee of his attorney at $30,000 and allowing a further payment of $769.11 to the account of the Receivers (being document No. 84 in the files of this action).

16. Petition for appeal and order allowing same (being document No. 87 in the files of this action).

17. Assignment of errors (being document No. 88 in the files of this action).

18. Petition for supersedeas and order allowing

same and fixing the amount of bond therefor (being document No. 89 in the files of this action).

19. Bond on appeal and supersedeas bond (combined in one document), (being document No. 91 in the files of this action).

20. Statement of the evidence herein, prepared and filed by the objecting creditors, as the same shall hereafter be settled and allowed by the Court (which document is filed contemporaneously with this praecipe).

21. Copy of this praecipe.

Please prepare a certificate of the transcript of this record, and attach thereto the original citation on appeal, on file herein.

Dated: September 17, 1928.

FRANCIS J. HENEY,
GRANT H. WREN,
C. A. SHUEY,
Attorneys for Objecting Creditors (Appellants).

[Endorsed]: Filed Sep. 19, 1928. [624]

(Title of Court and Cause.)

ORDER ENLARGING TIME TEN DAYS FOR FILING COUNTER-PRAECIPE.

Good cause appearing therefor, IT IS HEREBY ORDERED that the appellees in the above-entitled matter may have ten (10) days' additional time from September 27th, 1928, within which to file with the Clerk of the above-entitled court a counter-

praecipe in the matter of the record to be incorporated into the transcript on appeal in the above-entitled proceeding. And the time of the appellees in the premises is hereby enlarged accordingly.

Dated, September 25th, 1928.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed September 26, 1928. [625]

(Title of Court and Cause.)

ORDER ENLARGING TIME TWO WEEKS FOR FILING OF COUNTER-PRAECIPE.

Good cause appearing therefor, IT IS HEREBY ORDERED that the appellees in the above-entitled matter may have two (2) weeks' additional time from October 8th, 1928, within which to file with the Clerk of the above-entitled court a counter-praecipe in the matter of the record to be incorporated into the transcript on appeal in the above-entitled proceeding. And the time of the appellees in the premises is hereby enlarged accordingly.

Dated, October 6th, 1928.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed October 6th, 1928. [626]

(Title of Court and Cause.)

ORDER ENLARGING TIME ONE WEEK FOR FILING COUNTER-PRAECIPE.

Good cause appearing therefor, IT IS HEREBY ORDERED that the appellees in the above-entitled matter may have one (1) week additional time from October 22d, 1928, within which to file with the Clerk of the above-entitled court a counter-praecipe in the matter of the record to be incorporated into the transcript on appeal in the above-entitled proceeding. And the time of the appellees in the premises is hereby enlarged accordingly.

Dated, October 20, 1928.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed October 20, 1928. [627]

(Title of Court and Cause.)

ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 8, 1928, FOR FILING OF COUNTER-PRAECIPE.

Good cause appearing therefor, IT IS HEREBY ORDERED that the appellees in the above-entitled matter may have additional time; that is to say, to and including the 8th day of November, 1928, within which to file with the Clerk of the above-entitled court a counter-praecipe in the matter of the record to be incorporated in the transcript on

appeal in the above-entitled proceeding. And the time of the appellees in the premises is hereby enlarged accordingly.

Dated: October 27, 1928.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed October 27, 1928. [628]

(Title of Court and Cause.)

ORDER EXTENDING TIME TO AND INCLUDING DECEMBER 6, 1928, TO CERTIFY AND TRANSMIT TRANSCRIPT OF RECORD.

Good cause appearing therefor, and pursuant to stipulation of the parties hereto, filed herein, the time within which the Clerk of this court may certify and transmit the transcript of the record on appeal in the above-entitled cause is hereby extended until and including December 6, 1928.

Dated: October 27th, 1928.

A. F. ST, SURE,
United States District Judge.

[Endorsed]: Filed October 27th, 1928. [629]

(Title of Court and Cause.)

COUNTER-PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the above Court:

Come now the appellees and respectfully request the Clerk of the above-entitled Court to prepare and certify as part of the transcript of record on appeal in the above-entitled cause the following, viz.:

1. Petition for order authorizing auditor to make trip to New York, filed October 25th, 1926, Document No. 19;

2. Order dated October 25th, 1926, authorizing auditor to make trip to New York, filed October 25th, 1926, Document No. 21;

3. Stipulation of Joseph Kirk concerning filing of claims in New York to be considered as filed here, filed December 10th, 1926, Document No. 25;

4. Order based on last-mentioned stipulation, filed December 10th, 1926, Document No. 26;

5. Order dated September 10th, 1928, authorizing dividend and fixing attorney's fees and Receiver's fees on account, Document No. 27;

6. Order authorizing payment of dividend of ten per cent, filed May 11th, 1927, Document No. 36;

7. Petition for order in premises, filed May 11th, 1926, Document No. 35;

8. Stipulation dated February 1, 1927, re reduction of fees, filed May 20th, 1927, Document No. 45;

9. Order amending order of December 10th,

1926, on stipulation, filed May 20th, 1927, Document No. 46;

10. Supplemental account and report, filed October 19th, 1927, Document No. 67;

11. Memorandum for order conditioned on paying $1700, dated March 26th, 1928, Document No. 83;

12. Supplemental and final account, filed April 5th, 1928, showing contributions and also payment of balance of fees and remittance to New York, Document No. 85;

13. Copy of order extending time to file counter-praecipe, filed September 26th, 1928, Document No. [630]

14. All orders enlarging time for filing of counter-praecipe, including order enlarging time, dated October 27th, 1928;

15. Copy of this counter-praecipe.

Dated, November 1st, 1928.

CROBSY & CROSBY and
EDWARD R. ELIASSEN,
Attorneys for Appellees.

Receipt of a copy of the within counter-praecipe etc. is hereby admitted this 3d day of November, 1928.

FRANCIS J. HENEY,
GRANT H. WREN,
C. A. SHUEY,
Attorneys for Appellants.

[Endorsed]: Filed Nov. 3, 1928. [631]

(Title of Court and Cause.)

STIPULATION RE CONTENTS OF TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the Above Court:

Heretofore, the appellants in the above-entitled action served and filed a praecipe for the transcript of the record on appeal in the above-entitled action; and thereafter and in due time, the respondents served and filed a counter-praecipe for such transcript of record on appeal.

The appellants and respondents have agreed, and hereby stipulate, that the transcript of record on the appeal in the above-entitled action shall consist of the following documents:

(1) All of the documents mentioned in the appellant's praecipe above mentioned; the respondents hereby consenting to each and all thereof;

(2) Items numbered 3, 4, 5, 9, 11, 12, 13, 14 and 15, contained in respondent's praecipe above mentioned; the appellants hereby consenting to each and all of the foregoing documents and the respondents hereby withdrawing documents numbered 1, 2, 6, 7, 8 and 10 in respondent's praecipe above mentioned.

(Attention is directed to document numbered 5 in respondents counter-praecipe. The date of the document is given as September 10, 1928; this is erroneous; the correct date is December 10, 1926.)

(3) A copy of this stipulation.

Dated: November 26th, 1928. [632]

FRANCIS J. HENEY,
GRANT H. WREN,
C. A. SHUEY,
Attorneys for Appellants.
CROSBY & CROSBY,
EDWARD R. ELIASSEN,
Attorneys for Respondents.

[Endorsed]: Filed November 26th, 1928. [633]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing six hundred and thirty-three (633) pages, numbered from 1 to 633, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipes for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the costs of the foregoing transcript of record is $313.90; that the said amount was paid by the appellant and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set

my hand and affixed the seal of said District Court this 17th day of December, A. D. 1928.

[Seal] WALTER B. MALING,
Clerk, United States District Court, for the Northern District of California. [634]

[Title of Court and Cause.]

CITATION.

The United States of America to A. F. LIEURANCE, EDWARD R. ELIASSEN and PHILLIP A. HERSHEY, GREETING:

YOU AND EACH OF YOU ARE HEREBY NOTIFIED that in a certain case in equity in the United States District Court for the Northern District of California, Southern Division, wherein Sidney Gilson, Herman Avrutine and Samuel Avrutine, copartners engaged in business as National Garment Co. are plaintiffs, and R. A. Pilcher Co. Inc., is defendant, an appeal has been allowed the objecting creditors, Walton N. Moore Dry Goods Co., J. H. Newbauer & Company, G. W. Reynolds Co., Inc., and L. Dinkelspiel Co., Inc., from the judgment and decree entered therein on the 27th day of March, 1928, to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, thirty days after the date of this citation, to show cause, if any there be, why the judgment and

decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS, the Honorable A. F. ST. SURE, United [635] States District Judge for the Northern District of California, Southern Division, and the Judge who presided at the trial and rendered the judgment and decree in this case, in said United States District Court for the Northern District of California, Southern Division, this 9 day of July, 1928.

A. F. ST. SURE,

United States District Judge, in and for the Northern District of California, Southern Division. [636]

[Endorsed]: Citation. Filed Jul. 10, 1928. [637]

[Endorsed]: No. 5660. United States Circuit Court of Appeals for the Ninth Circuit. Walton N. Moore Dry Goods Co., a Corporation, J. H. Newbauer & Company, a Corporation, G. W. Reynolds Co., Inc., a Corporation, and L. Dinkelspiel Co., Inc., a Corporation, Appellants, vs. A. F. Lieurance, and Phillip A. Hershey, as Receivers of R. A. Pilcher Co., Inc., a Corporation, Bankrupt, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed December 17, 1928.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.